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NO. 94-

94-8842

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. **Should Certiorari be granted to vindicate the integrity of the United States jury system, by holding that admitted government misconduct which has a substantial likelihood of inflaming the passions of the jury requires reversal in light of other factors in the argument, and the other circumstances of this case, including the relationship of the misconduct to overwhelming external pressures on the jury?**

2. **Did the Government's use of the video taped testimony of co-defendant Briseno from a prior trial violate petitioner's right of confrontation, where that co-defendant did not testify in this trial and where the district court found that the core of the complaint in the prior trial was assault and battery, and the core of the present case was the violation of civil rights, and where, since the time of the prior trial, the government has created new evidence bearing directly upon the credibility of the non-testifying co-defendant?**

3. **Did jury instructions approved in the Ninth circuit, and given in this case, defining the elements of a violation of 18 U.S.C. § 242 [Willful Deprivation of civil rights], unconstitutionally relieve the government of the burden of proving a necessary element of the crime -- the mens rea -- that the act which violated the victim's rights be willful, and done with the requisite specific intent to violate those rights?**

4. **Should Certiorari be granted to resolve a sharp conflict in the Circuits in the essential approach to reviewing departures under the United States Sentencing Guidelines, and in the correct analysis of the particular categories of downward departure involved in this case?**[1]

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[1] Combination of non-prohibited factors vs. "appropriate" factors; Victim provocation that precipitates an *immediate* response vs. victim provocation that substantially contributes to the danger presented, or is an extended course of conduct.

NO. 94-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, LAURENCE M. POWELL, respectfully prays that a writ of certiorari issue to review the decision of a panel of the United States Court of Appeals, Ninth Circuit, affirming his conviction[2] and reversing his sentence and remanding for re-sentencing. He was convicted of violating Title 18 United States Code, Section 242, and sentenced to 30 months in federal prison.

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[2] Petitioner appealed from the judgment of conviction only. In a cross-appeal, the Government appealed the sentence, contending the district court erroneously determined the injury was "bodily injury" but not "great bodily injury"; and contending the district court erroneously departed (downward) from the applicable guideline sentence.

OPINION(S) BELOW

The opinion of the circuit court appears in the official reports at 34 F.3d 1416. On January 12, 1995 the Circuit Court denied rehearing and rejected a suggestion for rehearing *en banc*. Two dissenting opinions, dissenting from the denial of rehearing *en banc*, which were joined in by a total of nine judges of the Circuit court, were filed and appear at 45 F.3d 1303 as amended. The opinions of the panel, affirming the convictions, and reversing the sentence, as well as both dissenting opinions are reproduced in the Appendix.[3] The appeal was consolidated with the appeal of Petitioner's co-defendant, Stacey Koon. To the extent applicable, Petitioner POWELL adopts and incorporates by this reference the arguments raised in the Petition for Writ of Certiorari on file, or to be filed herein on behalf of Stacey Koon, in this matter.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on August 4, 1993. The circuit court opinion was filed on August 19, 1994. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on January 12, 1995. This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

[3] In the proceeding below Laurence M. Powell, Petitioner herein, appeared as defendant, appellant and cross-appellee; the United States of America appeared as plaintiff, appellee, and cross-appellant.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the due process clause of the Fifth, and Sixth, and Fourteenth Amendments to the United States Constitution, the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the United States Sentencing Guidelines.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner seeks Certiorari to review the circuit court's rejection of several of the arguments he raised on appeal, and its determination that an additional error he alleged, although present, was harmless. In addition, Petitioner seeks review and reversal of the circuit court's judgment (on the Government's cross-appeal) reversing the sentence.

Rodney King was speeding and evading arrest and led pursuing officers in a chase during which he failed to yield for a prolonged period of time. When he was stopped, he did not obey commands given to him by police officers and he was generally uncooperative.

Several officers on the scene drew firearms in response to the situation, and a large number of police officers were eventually assembled. The person in charge of the encounter was Sergeant Stacey Koon, one of the appellants in this appeal.

Mr. King was ordered to the ground, but only partially complied, going down to his hands and knees. His resistance to police commands and efforts to cuff him then began. King did not obey commands issued to him by Sgt. STACEY KOON, Petitioner LAURENCE POWELL or Officer TIMOTHY WIND, and he rose up while being cuffed and POWELL and

other officers fell or were thrown off him.

KOON used a police taser in an effort to temporarily disable King. After shooting two taser darts at him, King appeared to be shaken for a moment, but then was able to shake the effects of the taser off. He then arose and charged at or near Petitioner, Officer POWELL. As King approached him, POWELL struck King with a baton. It was disputed where that baton blow landed, on the upper body, or the face or head.

In the next 60 or so seconds, POWELL and WIND administered numerous baton blows. The Government's experts contended, generally, that these blows were unjustified, while the defense expert said each use of force (baton blow, or kick, etc.) was justified by a movement or refusal of King to comply or submit.

The Government introduced the infamous Holliday video tape which captured the last minute and 28 seconds of these events.

Over strenuous defense objection, on rebuttal, the government introduced an excerpt of the video taped trial testimony from the prior state trial of the case, the "Simi Valley trial" of one of the four officer's on trial, Theodore J. Briseno. This prior testimony included accusations that POWELL hit King in the head with his baton. Briseno, generally, condemned the use of force by POWELL.

In surrebuttal, the defense established that a "registered video" was much clearer than the Holliday video, that it coincides with defense evidence that the blow to King during his "charge" at or near POWELL was not to the face or head. The registered video was not available in the Simi Valley trial.

Petitioner testified that he believed the force he used was necessary and lawful in light of the facts Mr. King had charged at him after being tased, he was an unsearched felony suspect, and he continued to resist and get up in a threatening manner despite police commands to submit to arrest.

The jury was instructed that to convict they must find five elements, including *both* that the use of force was unreasonable, *and* that the application of unreasonable force was "willful." Nevertheless, given the language the jury was instructed in, and the prosecutor's argument to the jury, it is likely that the intent element of this crime was misunderstood by the jury, and that the "unreasonable" use of force element was unconstitutionally applied.

The Court instructed the jury that to be "willful," a violation of Rodney King's civil rights must be with "a specific intent to use more force than is reasonable under all the circumstances," but it also told the jury:

> "It is not necessary for you to find that a defendant was thinking in constitutional terms at the time. You may find that a defendant acted with the required specific intent, even if you find he had no real familiarity with the constitution or with the particular right involved, provided you find that the defendant intended to accomplish that which the Constitution forbids. The government may meet its burden, even if the defendant was motivated by fear, anger or some other emotion . . ."

The court also said:

> "The term 'willfully' as used in these instructions to describe the alleged state of mind of a defendant means that he knowingly acted or failed to act deliberately and intentionally as contrasted with accidently, carelessly or unintentionally."

In arguing to the jury, the prosecutor said, among other things:

> "It is not, I repeat it is not, what these defendant's think was reasonable. It is what a reasonable and ordinary police officer thinks is reasonable that is the standard you must employ."

During the final summation to the jury the prosecutor said the "real question" the jury was to answer was:

> "Which of these two officers[4] would you want teaching recruits how much force can be used against the citizens of this community? That's the real question, and you know the answer."

Under the guise of emphasizing that one or more of the police officers present lied about whether King was down on the ground when baton blows were delivered, the prosecutor improperly discussed and then emphasized, world wide "horror and outrage" at seeing the Holliday video tape.

> ". . . [T]here was one thing that everyone from Paris to Tokyo noticed, one thing that everyone saw. There was one thing that caused horror and outrage throughout this world. There was one thing that neither you nor anyone else missed when they saw that video tape. Even if they saw it for five or ten seconds. And the thing that everyone saw, that everybody was so outraged about was that the defendants were beating a man who was on the ground. That's why there was such outrage. That's why there was such uproar."

Finally, after playing the last 50 seconds of the video tape, he concluded his argument with:

> ". . . and you will leave with your collective good common sense, because ladies and gentlemen of the jury, you're the conscious (sic) of the community. You decide what conduct is acceptable by your police. And what conduct violates the law."
>
> * * *
>
> "There are some countries where people can be beaten by the police until they beg the police to stop, but not in this country. Not now, not 200 years ago when this Constitution was written, and with your decision, not ever."

On appeal, the Government conceded and the panel below found that the "Paris to Tokyo" remark was prosecutorial misconduct.

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[4] The Government's use of force expert, Sgt. Mark Conta, or the defense use of force expert, Sgt. Charles Duke.

Despite the fact a higher sentence would have been lawful under the United States Sentencing Guidelines, the District Court departed downward from the applicable Guideline range, and sentenced the petitioner to 30 months in prison, based on the victim's provocation, additional punishment defendants have and would suffer by reason of their status and notoriety in prison, the fact the defendants would face an administrative proceeding for the identical conduct, and the fact the defendants had already been subjected to a state prosecution for the same conduct, their extreme vulnerability in prison.[5] The Government appealed the downward departure.

The Circuit court affirmed the conviction and reversed the sentence, holding the District Court erred in departing downward on any and all theories.

SUMMARY OF ARGUMENT

1. Despite authoritative decisions of this Court, the panel below erroneously concluded that admitted misconduct by the Government in argument did not constitute "plain error" even though it acknowledged that the arguments "went beyond the bounds of appropriate advocacy and were improper" and despite the finding by the panel the "prosecutor's reference to public outrage could easily incite the passions, fears and prejudices of the jurors, remind them of the social ramifications of their verdict, and persuade them to convict the defendants for reasons irrelevant to appellant's guilt." (Issue I below).

[5] After finding the defendant inflicted bodily injury, the Court departed downward 8 levels. Five were based on the Court's application of U.S.S.G., Section 5K2.10 (VICTIM PROVOCATION) and three levels on the combination of other factors.

2. Petitioner was deprived of a meaningful opportunity to confront and cross-examine his co-defendant, Briseno, whose prior testimony from the former state trial was tape recorded and played for the federal jury, because between the two trials, substantial new evidence was created by the Government which seriously questioned the thrust of that prior testimony, and the Government chose to prosecute the defendants (and resisted motions to sever) such that Briseno would be unavailable to Petitioner to call and cross-examine, or confront with that new evidence. (Issue II below)

3. Jury instructions approved in the Ninth circuit, and given in this case defining the elements of a violation of 18 U.S.C. 242 [Deprivation of civil rights] unconstitutionally relieve the Government of the burden of proving a necessary element of the crime -- the mens rea -- that the act which violated the victim's rights be willful, and done with the requisite specific intent.

The jury was told *it* determined whether the victim was deprived of a constitutional right, by virtue of an objective standard. If the jury found the amount of force was, objectively, unreasonable under the circumstances, then it was a violation of the defendant's civil rights. The jury was further told that to be guilty the defendant must have wilfully deprived the victim of civil rights, but that this was proven if the defendant "knowingly acted or failed to act" and "even if [they] find he had no real familiarity with the constitution or with the particular right involved", so long as the thing he intended to do was that which the constitution forbids.[6] The

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[6] The Ninth Circuit panel that affirmed the conviction noted that "it may appear paradoxical to say both that a defendant must have the specific intent to violate the Constitution and that the defendant may have this intent even if he is not 'thinking in constitutional terms'. It found this to be explained however by concluding that "willfulness" includes "reckless disregard of a (continued...)

jury was never told that to be criminal, the deprivation of rights must be inflicted with the purpose of depriving the victim of rights or of violating the constitution, which is what *Screws* v. *United States, supra,* held the jury must be told. Rather, this jury was told the act of inflicting force must be intentional, and the amount of force inflicted must be, objectively, unreasonable. Then the defendant is guilty, ***even if the defendant subjectively believed his actions were lawful, and reasonable.*** The prosecutor underscored this interpretation of the instructions in his argument when he told the jury "it is not, I repeat it is not, what these defendant's think was reasonable" and later told the jury that they "decide what conduct is acceptable by your police and what conduct violates the law."

4. The opinion of the Ninth Circuit reversing the sentence in this case on the ground that the District Judge erred in departing downward creates a sharp conflict in the Circuits[7] on the basic role of the Court in fixing the sentence under the United States Sentencing Guidelines.[8] The panel opinion below conflicts in the essential approach to reviewing departures with the

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[6](...continued)
constitutional right that has been made specific and definite." The court below quoted from a prior Ninth Circuit opinion, in *United States* v. *Reese*, 2 F.3d 870, 881 (9th Cir. 1993), quoting from *Screws* v. *United States*, 325 U.S. 91, 89 L.Ed.2d 1495, 65 S.Ct. 1031 (1945). In fact, in its discussion of "willfulness" *Screws* talks about "reckless disregard" of the criminal statute prohibiting violation of constitutional rights. ["He is under no necessity of guessing whether *the statute* applies to him (cite omitted) for he either knows or acts in reckless disregard of *its* prohibition of the deprivation of a defined constitutional or other federal right." (Italic supplied.)] The reference "to statute" is clearly to s. 20, not to the constitutional right involved.

[7] And a conflict with the prior decisions of the Ninth Circuit.

[8] This case is an excellent vehicle for resolving this issue in light of its national notoriety, and the fact that the District Judge, the Honorable John Davies wrote a scholarly and extensively documented **SENTENCING MEMORANDUM**, in which he analyzed the evidence and found the facts of the case relative to the sentence. That SENTENCING MEMORANDUM is published at 833 F.Supp. 769, and was before the Circuit Court on appeal.

highly respected opinion of (then) Chief Judge Breyer, in *United States* v. *Rivera*, 994 F.2d 942, 952 (1st Cir. 1993), and in the correct analysis of the particular categories of downward departure[9] with *both United States* v. *Rivera*, *supra*, and *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). A forceful and convincing dissent from the denial of rehearing *en banc*, concurred in by nine respected active members of the Ninth Circuit Court of Appeals, persuasively argues that the correct overall approach to departures under the Guidelines is that found in *United States* v. *Rivera*, *supra*, and that under any well reasoned approach the District Court's downward departure to a 30 month prison sentence in this case was lawful. Petitioner seeks Certiorari to resolve these conflicts and seeks the establishment of an approach to guide all District Courts in departing under the Guidelines.[10] (Issue 4 below)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

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1. **Certiorari should be granted to vindicate the integrity of the United States jury system, by holding that admitted government misconduct which has a substantial likelihood of inflaming the passions of the jury requires reversal in light of other factors in the argument, and the other circumstances of this case, including the relationship of the misconduct to overwhelming external pressures on the jury.**

The panel opinion erroneously concluded that admitted misconduct by the Government in argument did not constitute "plain error." (Slip Op. p. 9406).

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[9] Combination of non-prohibited factors vs. "appropriate" factors; Victim provocation that precipitates an *immediate* response vs. victim provocation that substantially contributes to the danger presented, or is an extended course of conduct.

[10] A subject of great nationwide concern on which this Court has never expressed an authoritative view.

The comments employed by the prosecutor here placed on the jury the burden of (1) dictating the way they want the police taught in the future; (2) denying the validity of the "horror and outrage" expressed from "Paris to Tokyo"; (3) being the "conscience of" the Los Angeles "community" in light of the riots in that community that followed the acquittals in Simi Valley; (4) deciding not just this case, but what conduct is acceptable by "their" police; (5) deciding what conduct "violates" the law; and (6) determining by their verdict whether the Constitution (as the prosecutor has depicted it) will survive, has been condemned as egregious misconduct that deprives the defendant of a fair trial and requires reversal.[11]

Remarkably, after citing the test for plain error as "a highly prejudicial error affecting substantial rights"[12] the court below found that the prosecutor's argument to the jury in this case that:

> ". . . [T]here was one thing that everyone from Paris to Tokyo noticed, one thing that everyone saw. There was one thing that caused horror and outrage throughout this world. There was one thing that neither you nor anyone else missed when they saw that video tape. Even if they saw it for five or ten seconds. And the thing that everyone saw, that everybody was so outraged about was that the defendants were beating a man who was on the ground. That's why there was such outrage. That's why there was such uproar."

was not plain error.

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[11] *Berger* v. *United States*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935) ["The United States Attorney . . . may prosecute with vigor -- indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (295 U.S. at 88-89, 55 S.Ct. at 633.)]; *Viereck* v. *United States*, 318 U.S. 236, 247-48, 87 L.Ed. 734, 63 S.Ct. 561, 566 (1943) [held the comments of the prosecutor, which appeal to the national or patriotic community interest of the jury prejudiced the petitioner's right to a fair trial].

[12] Citing *United States* v. *Dischner*, 974 F.2d 1502, 1515 [a case involving alleged jury instructional error]. (Slip Op. pp. 9401-9402).

This is all the more remarkable since the panel clearly found the remarks to be misconduct, and further, explicitly found they "went beyond the bounds of appropriate advocacy and were improper."

More importantly, the panel found the "prosecutor's reference to public outrage *could easily*" incite the passions, fears and prejudices of the jurors, remind them of the social ramifications of their verdict, and persuade them to convict the defendants for reasons irrelevant to appellant's guilt.

Somehow, however, the panel went on to conclude that although this argument "could easily" ... "persuade them [the jurors] to convict the defendants for reasons irrelevant to defendant's guilt" the jury did not do so.

Three reasons were given. (1) The remarks were isolated in a trial that lasted over a month and in an argument that lasted several hours; (2) The jury was admonished to decide the case on the evidence and not on the ramifications of the verdict; (3) There was substantial *independent* evidence to support a finding of guilt. But none of these reasons withstands scrutiny in the context of this case.

Isolation of improper, prejudicial remarks that could persuade jurors to convict for "irrelevant reasons" or incite the passions, fears and prejudices of the jurors is not a valid basis for finding that the remarks are not highly prejudicial.[13] In fact, it cannot be gainsaid that the

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[13] In this first reason, the panel included: (a) The remarks were not part of a series of improper comments; (b) were made in response to defense arguments; (c) the phrase "Paris to Tokyo" was a phrase used by the defense first. The panel concluded on p. 9407 of the Slip Opinion, "The misconduct was partially invited, isolated, and of limited severity." This conclusion is either nonsense, or not supported by reference to the record. While the misconduct was made as a part of a response to a defense argument, the offending remark was (continued...)

jurors in *this* case, like those in the District of Columbia case cited by appellant, where the D.C. Circuit held raising the specter of marshall law constituted a prejudicial appeal to passion in view of the context of social unrest of the 1960's. There a black man was charged with assault on a police officer. *Brown* v. *United States*, 370 F.2d 242 (D.C. Cir. 1966). Moreover, this conclusion brings this Circuit in conflict with the conclusion of the Eighth Circuit, which said in *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992), "a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated." Petitioner can hardly imagine a remark more destructive to his right to a fair trial that persuades the jury to convict him for irrelevant reasons, *and* inflames their passions, incites their emotions, and prejudices, and reminds them of the social or political ramifications of their verdict, *in light of the recent historical context of this trial.*[14]

Nor does the jury admonition to decide the case on the evidence overcome misconduct that persuade[s] the jury to decide it on irrelevant matter. This conclusion seems self-evident.

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[13](...continued)
not responsive to in. Although the court concludes the remark was not a part of a series of *improper* comments, appellant has in his briefs set out several other remarks which could, *in the context of the pre trial riots, and this improper remark,* have had an improper purpose and effect. The phrase "Paris to Tokyo" was not improperly used by the defense as it was by the prosecution, and simply using the same form of words that opposing counsel used, as part of an improper comment in no way excuses the impropriety. Finally, the term "of limited severity" is a nonsense term in this situation. Of course all impropriety is of "limited" severity. But the term "limited" is so non-quantified that it has no meaning here. The Court cannot say it was barely sever, in light of its own findings of what the remark could "easily" do. (Slip Op., p. 9406).

[14] The jurors' knowledge of that riot-torn recent history was also acknowledged by th panel, which wrote: "In this case, the worldwide broadcast of the Holliday videotape and the acquittal of appellants by the Simi Valley jury sparked widespread rioting and the general public outrage of which the jury could not help but be aware. (Slip Op. 9406)

Moreover, the authority cited below for this second reason for finding the misconduct not prejudicial does not support application of that reason to this case. In *United States* v. *Flake*, 746 F.2d 535, 542 (9th Cir. 1984) *cert. denied*, 469 U.S. 1225 (1985), e.g., the admonition was given as to a particular improper comment of the prosecutor, not general and as a part of the overall charge to the jury, as here.[15] *United States* v. *Lester*, 749 F.2d 1288, 1301 does not involve a situation in which an admonition was held to cure misconduct at all. Rather the court noted in passing, during a discussion of alleged misconduct, that improprieties are not reversible unless they are prejudicial and not neutralized by the trial judge. The case does not stand for the proposition that general admonitions can cure the kind of impropriety the panel found the government committed here. Finally, *United States* v. *Williams*, 989 F.2d 1061 is nothing more than another opinion written by the author of the panel opinion in this case saying that in light of the isolated nature of the prosecutor's improper comment, and in light of the general admonition, it did not affect the ability of the jury to weigh the evidence. Assuming that case was correctly decided, the prosecutor's comment there was far less egregious than the comment condemned here,[16] and the context of the argument was vastly different.[17]

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[15] Here there would not have been an admonition even if there had been a contemporaneous objection, since the District Court erroneously concluded (on the motion for new trial) that this remark was not improper. Obviously had an objection been made at the time, he would have overruled it, not given a pin-pointed admonition that it should be disregarded as the District Judge did in *United States* v. *Flake*, *supra*.

[16] The prosecutor threw the defendant's car keys, and exhorted the jury to "tell George Allen to take his keys back to Denver, and tell these defendants we do not want crack in Montana." (989 F.2d at p. 1072). While the remarks were colorful, and did have a certain parochial appeal, they did not ask the jury to convict even if they did not think the defendants had 'crack' which was the gravamen of the charge against them. In short, the remark, while improper, could not persuade the jury to convict on the basis of irrelevant matters.

Nor does the strength of the evidence in this case justify the panel's conclusion, since the same evidence was available in the Simi Valley trial, and no convictions were obtained.[18] The panel opinion and the government admitted that the remark of the prosecutor was improper. The panel also admitted it could result in a verdict of guilt NOT based on the evidence.

This Court should issue Certiorari to re-affirm that the decisions of juries in the Courts of the United States are not subject to public opinion even when it is a view held from "Paris to Tokyo."

If here, in one of the most watched examples of the manner in which the United States government prosecutes criminal cases, its attorneys are seen to obtain a verdict of guilty by telling the jury, drawn from a riot-torn community, that they are the "conscience of that community", and that their verdict will determine how the conduct of the police of their city will be judged in the future, and finally, that they hold the future meaning of the U.S. Constitution in their hands, the tactic will be seen as both severely "egregious" and to have created a "miscarriage of justice." For obviously, justice is denied when the process by which a verdict

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[17](...continued)

[17] Other than the world wide crisis associated with drug use and abuse, there was no local history in Montana that could approach the kind of atmosphere that existed in Los Angeles prior to and during the federal trial in this case. To imply that the two situations are alike is either myopic, or is a "category" mistake. The difference between the concern local jurors might have for a growing drug problem, to the extreme awareness the record in this case discloses these jurors had of the explosive, deadly rioting that followed the Simi Valley verdicts is not merely a difference in degree, but a difference in kind.

[18] Nor does the fact that the jury convicted two defendants, while acquitting two, show the grossly improper remarks of the prosecutor did not affect the jury's ability to weigh the evidence. In light of the fact that *none* of the defendants were convicted in the state trial, and the ensuing riots, this jury may easily have been persuaded to convict one or two defendants precisely in order to appease the community, for exactly the irrelevant reasons the panel's opinion acknowledged the misconduct could persuade them to rely on.

is obtained is grossly improper, just as when the perceivably wrong result is obtained.

With this backdrop, these improper comments exhorted the jury to convict the defendants in order to protect community values, preserve civil order, protect the constitution, and deter future lawbreaking. Invoking these considerations, which have great impact on perceptions and emotions, as reasons to convict, could only have affected the verdict, and could only have been designed to affect it.[19] These comments are more egregious than those resulting in reversal in *Brown* v. *United States*, 370 F.2d 242 (D.C. Cir. 1966)[20] and the language of the D.C. Circuit in *United States* v. *Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985) is particularly *apropos*.

> "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear. (741 F.2d at 1441).

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[19] In *Viereck* this Court framed the issue in terms of both the purpose *and the effect* of the comments, holding in light of contemporaneous events, which had great impact on the emotions and perceptions of jurors, that the questioned remarks "could only have . . . arouse[d] passions and prejudice." (*Viereck* v. *United States*, 318 U.S. at 247, 63 S.Ct. at 566.)

[20] In *Brown* an African-American youth was charged with assault on two police officers. During closing argument the prosecutor warned the jury that to acquit would leave the police powerless to protect themselves and citizens against assault short of resort to martial law. The Court found this remark to be wholly irrelevant to any facts or issues in the case (370 F.2d at 246), and further stated that raising the specter of marshall law constituted an especially flagrant and reprehensible appeal to passion and prejudice in the context of current events (i.e. the social unrest of the late 1960's.)

Although there was no contemporaneous objection to these remarks, the record establishes that such an objection would have been useless.[21] Moreover, even if this misconduct, collectively, is judged by the plain error standard,[22] it requires reversal in light of the authorities in which less damning misconduct was held prejudicial and violative of the due process right to a fair trial.[23] Nor is this a case of overwhelming evidence.[24]

The "prosecutor's use of illegitimate means to obtain a verdict" has brought "his office and our system of justice into disrepute"[25] in this case in which the entire world is indeed watching to see how our system of justice works. This Court is urged to resist the invitation that seduced the jury below, to sacrifice these defendants' due process right to a fair trial on the altar of declaring to everyone from "Paris to Tokyo" that it disapproves of the police conduct in this case, or of declaring by its ruling in this case how the police should be taught in the future. Neither this Court, nor the trial jury should act as the conscience of the community *rather than* arbiters of the law and facts. Given the evidence of the prosecutor's summation and

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[21] Petitioner did raise the question of the prosecutor's exhortation to the jury that they were the "conscience of the community" as misconduct in his new trial motion, and the trial judge ruled it was not misconduct. As such, any contemporaneous objection would have left the record the same as it is now -- without an admonition.

[22] *United States* v. *Williams*, 990 F.2d 507, 511-112 (9th Cir. 1993).

[23] Cf., *United States* v. *Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991); *Brown* v. *United States*, *supra*, 370 F.2d at 246; *Viereck* v. *United States*, *supra*, 318 U.S. at 247-8; *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) ["a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated."].

[24] The strength of the case is relevant. (*United States* v. *Schuller*, 813 F.2d 978, 982 (9th Cir. 1987) [finding error prejudicial "in light of prior hung jury"]. Here the prior acquittals and hung jury, together with the split verdict show the case was not overwhelming, despite the Holiday video tape.

[25] *Commonwealth* v. *Mendiola*, 976 F.2d 475, 487 (9th Cir. 1992) ["A prosecutor's use of illegitimate means to obtain a verdict brings his office and our system of justice into disrepute."]

the relative strength (or weakness) of this case,[26] the law requires reversal of this conviction under either the harmless error or plain error standard.

Under the prior decisions of this Court, the misconduct, which would not have been ameliorated, even if a timely objection had been made, is the type of plain error that requires a new trial free of such error.

2. **The Government's use of the video taped testimony of co-defendant Briseno from a prior trial violated Petitioner's right of confrontation, where that co-defendant did not testify in this trial and where the District Court found that the core of the complaint in the prior trial was assault and battery, and the core of the present case was the violation of civil rights, and where since the time of the prior trial, the government has created new evidence bearing directly upon the credibility of the non-testifying co-defendant, whose prior testimony is being offered?**

The confrontation issue in this case is stated as follows:

> Did the introduction of the "former testimony" of a co-defendant, which included "expert" opinion [as to the propriety of what he observed] aspects, as well as eyewitness lay opinions [about what it was that he was seeing] violate the other defendant's right of confrontation where they could not confront him at the prior trial with new scientific evidence (available in the present trial) which would force him to recant, or reconsider *both* his opinion of what he was seeing, *and* his opinion of whether it was proper police procedure?[27]

The question is not whether the right of confrontation was violated in the former proceedings, but whether it would be violated in the present proceeding, in the context of the factual issues presented at the time the former testimony is offered. *United States* v. *Wingate*,

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[26] Where the case is "not strong" prejudice from improper argument is "highly probable." *Commonwealth* v. *Mendiola*, *supra*, 976 F.2d 475, 487; *United States* v. *Schuller*, *supra*, 813 F.2d 978, 982.

[27] Indeed, in a Motion submitted to the Panel, appellants included a transcript of Briseno's later testimony in which he did precisely that: he said that based on the new enhancements of the Holliday video tape he saw he was wrong about what he was seeing, and that in light of his "enhanced" perceptions he no longer thinks the conduct of appellants was improper.

520 F.2d 309 (2d Cir. 1975), *cert. denied* 423 U.S. 1074, 47 L.Ed.2d 84, 96 S.Ct. 858 (1976).)[28] See also, *United States* v. *Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990); 2 *McCormack on Evidence* § 304, at 315 (4th ed. 1992); 5 *Wigmore on Evidence* § 1387, at 91 (Chadbourne rev. 1974)[29]; 2 Steven A. Saltzburg & Michael M. Martin, *Federal Rules of Evidence Manual* 400 (5th ed. 1990)[30]; 11 J. Moore, H. Bendix, *Moore's Federal Practice* § 804.04[3], p. VII 266 (2d ed. 1989)[31] and see *United States* v. *Salerno*, 937 F.2d 797 (2d Cir. 1991)[32] and Fed.R.Evid. 804 advisory committee's note, 56 F.R.D. 183 (1972)[33]

The panel opinion states that it focused on whether the video tape of Briseno's state court

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[28] "The issues in the two proceedings [must be] sufficiently similar to assure that the opposing party had a *meaningful opportunity to cross-examine* when the testimony was first offered." (520 F.2d at 316).

[29] "The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested for cross examination *upon the point now in issue.*" (And see *Id.*, § 1386 stating that the requirement of an identity of issues in to ensure that the cross-examination in the two proceedings would have been directed at the same material points. [5 Wigmore, § 1386, at 90.]).

[30] "The way to determine whether or not motives are similar is to look at the similarity of the issues *and the context in which the opportunity for examination previously arose.*"

[31] The court will search for some identity of issues in order to determine whether a similar motive to develop the testimony "existed at the time of the elicitation of the former testimony."

[32] Stating that the similarity of motive requirement assures "that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party." (937 F.2d at 806).

[33] In determining similarity of motive the court should look first to what examination *in fact* occurred at the prior proceeding in order to determine whether the prior examination was "the equivalent of what would now be done if the opportunity [to examine] were presented." (56 F.R.D. at 323.)

testimony[34] was admissible under Federal Rules of Evidence, Rule 804(b)(1) in deciding if appellant is correct that his rights of confrontation were violated by its admission. This is a matter of syllogistic logic for the panel.[35] But, the confrontation issue in this case is more complicated than the simplistic analysis suggested by the syllogism.

Relying on a footnote in *Thomas* v. *Cardwell*, 626 F.2d 1375, 1386 n.34 (9th Cir. 1980) the panel concluded that the mere discovery of new evidence which discredits the former testimony of an unavailable witness "does not make the opportunity for cross-examination ineffective..." But as the opinion below itself admits, the *Thomas* v. *Cardwell* analysis was under circumstances where "there was no suggestion that the defendant's failure to discover the

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[34] It contained Briseno's opinions and what he said was his "recollections" and "observations" of the actual encounter between appellant POWELL, co-defendant WIND, and King. In particular, he testified that he believed he saw appellant POWELL strike King in the face during a point in the Holliday video that was blurry, in which it was not possible to tell what was being shown. In addition, Briseno's former testimony was to the effect that he saw appellant POWELL and defendant WIND strike King when he was not moving or posing any threat to, or assaulting them. He further stated that he could not see anything to justify the beating King was receiving, and he did not understand how the Sergeant (appellant KOON) could have permitted it, or have continued to order the baton blows given what he saw.

[35] This "focus" is dictated, the opinion contends by dint of a straight forward syllogism:
[Maj. Premise]: When a hearsay declarant is unavailable to testify at trial, his out-of-court statements may be admitted without violating the Confrontation Clause so long as those statements bear sufficient indicia of reliability. (citing *Bourjaily* v. *United States*, 483 U.S. 171 (1987).)
[Maj. Premise]: No independent inquiry into reliability is required under the Confrontation clause, however, when the out-of-court statements fall within a firmly rooted hearsay exception to the hearsay rule. (citing *Bourjaily* v. *United States*, 483 U.S. 171, 183.)
[Min. Premise]: The former testimony hearsay exception in Rule 804(b)(1) is a "firmly rooted exception." (citing *Mattox* v. *United States*, 156 U.S. 237 (1895).)
[Conclusion]: The tape recorded testimony of the Simi Valley trial of Briseno, who was unavailable in this federal trail did not violate the confrontation clause if it was admissible under the rule.

information was the prosecution's fault" (Opinion, p. 9367).

Here, on the other hand, the Government *chose* to jointly charge and try Briseno[36] and thereafter to resist appellant's motion to sever. Obviously, the government was well aware of the value (to the defense) of the new "enhancements" in contesting Briseno's Simi Valley trial, and yet made no effort to prosecute the officers in this case in a manner that would allow the jury to hear what Briseno has to say in light of the evidence which did not exist when he testified in Simi Valley. Instead the government resisted defense motions to sever the trial of the defendants, and told the jury that Briseno's opinion was that appellants were "out of control" despite their concession in the District Court his opinions should be edited out of the tape, and despite their knowledge that he may have changed his view based on the new "enhanced" evidence. In these circumstances, the inability of appellants to cross-examine Briseno on the basis of evidence likely to change *both* his opinion of what he saw appellant's do, and his opinion that it was improper, violated appellant's right of confrontation and to a meaningful opportunity to cross-examine Briseno. His testimony was allowed to go to the jury in a false light that prejudiced appellants.

In *People of Guam* v. *Hayes*, 1993 WL 469357 (D. Guam Oct.12, 1993) as here, the district court was confronted by a second trial in which new evidence changed the calculus of cross-examination in a way that was significant. Here, too, the government must admit Briseno's testimony was pivotal, and perhaps dispositive as to the verdict against appellants.[37]

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[36] Who was, ironically, fully acquitted in *both* the state and federal trials.

[37] Consider the reliance placed on it by the government in argument, and in cross-examining appellant Koon.

This fact alone makes changes in the evidence of what happened "extraordinary" enough to prevent a routine application of the former testimony rule to allow his state trial evidence to be received. Under these circumstances, petitioner was deprived of a meaningful opportunity to cross-examine Briseno, on whose testimony the government relied to convict petitioner. The denial of the right of confrontation requires reversal.

Certiorari should be granted to establish that where, as here, the government makes a witness unavailable after new evidence bearing on the core credibility of that witness's prior testimony is created or discovered, such prior testimony cannot be offered against a criminal defendant without violating his right to meaningfully confront and cross-examine the witness.[38] Here, the use of Briseno's former testimony without affording petitioner an opportunity to cross-examine him on the basis of critical evidence obtained, created, and discovered since the Simi Valley trial violated petitioner's Sixth Amendment right of confrontation.

3. **Jury instructions approved in the Ninth circuit, and given in this case defining the elements of a violation of 18 U.S.C. 242 [Deprivation of civil rights] unconstitutionally relieved the government of the burden of proving a necessary element of the crime -- the mens rea -- that the act which violated the victim's rights be willful, and done with the requisite specific intent.**

The District Court gave jury instructions using language and standards from this court's decision of *Graham* v. *Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989), in advising them of the elements of, and standard for convicting a police officer of violating Title 18 U.S.C. § 242. These instructions were later approved in *United States* v. *Reese*, *supra*, 2

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[38] The right of confrontation guarantees an opportunity for effective cross-examination, is satisfied where the defendant has a *full and fair opportunity* to bring out the witness' bad memory and other facts tending to discredit his testimony. Cf. *Delaware* v. *Fensterer*, 474 U.S. 15, 88 L.Ed.2d 15, 106 S.Ct. 292 (1985), *United States* v. *Owens*, 484 U.S. 554, 98 L.Ed.2d 951, 108 S.Ct. 838 (1988).

F.3d 870, 881, construing this court's decision in *Screws* v. *United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945).[39]

In particular, the jury in this case was instructed that to convict they must find five elements, including *both* that the use of force was unreasonable, *and* that the application of unreasonable force was "willful." Nevertheless, given the language the jury was instructed in, and the prosecutor's argument to the jury, it is likely that the intent element of this crime was misunderstood by the jury, and that the "unreasonable" use of force element was unconstitutionally applied.

The "willful" element - The Court instructed the jury that to be "willful," a violation of Rodney King's civil rights must be with "a specific intent to use more force than is reasonable under all the circumstances." It also told the jury:

> "It is not necessary for you to find that a defendant was thinking in constitutional terms at the time. You may find that a defendant acted with the required specific intent, even if you find he had no real familiarity with the constitution or with the particular right involved, provided you find that the defendant intended to accomplish that which the Constitution forbids. The government may meet its burden, even if the defendant was motivated by fear, anger or some other emotion . . ."

The court also said:

> "The term 'willfully' as used in these instructions to describe the alleged state of mind of a defendant means that he knowingly acted or failed to act deliberately and intentionally as contrasted with accidently, carelessly or unintentionally."

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[39] *Reese*, *supra*, also relied upon the decisions in *Williams* v. *United States*, 341 U.S. 97, 95 L.Ed.2d 774, 71 S.Ct. 576 (1951); *United States* v. *Guest*, 383 U.S. 745, 16 L.Ed.2d 239, 86 S.Ct. 1170 (1966); *United States* v. *Price*, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966) and *Anderson* v. *United States*, 417 U.S. 211, 41 L.Ed.2d 20, 94 S.Ct. 2253 (1974).

Clearly, the defense presented in this case was that the force used against Mr. King was motivated by reasonable (even if mistaken) fear on the part of petitioner (Powell), and an honest (even if mistaken) belief that the force was necessary to accomplish the arrest of King, who was never submissive to the police orders, and who was an unsearched felony suspect at the time he ran at Petitioner, and thereafter continued to rise up and buck the officers trying to subdue him.

These instructions have the effect of making the crime described in Section 242 of Title 18 a strict liability crime. Once the prosecution proves that, objectively, the amount of force used was unreasonable within the meaning of the Fourth Amendment, the volitional infliction of that force is equated with a specific intent to violate the victims constitutional rights, and a willful violation of the law.

But this is precisely what this Court held to be an improper interpretation of willful conduct in *Screws* v. *United States*, *supra*, 325 U.S. 91, 103-104.

Taken together, these instructions did not require the government to prove an element of the crime, but allowed the jury to convict if it found that an application of force that was a "volitional act" (i.e., not done by accident or while unconscious) was objectively unreasonable, regardless of what was in Petitioner POWELL's mind at the time. Here is what the prosecutor said to the jury in his final summation:

> "It is not, I repeat it is not, what these defendant's think was reasonable. It is what a reasonable and ordinary police officer thinks is reasonable that is the standard you must employ."

Of course, if officer POWELL thought his use of force was reasonable, he could not, as a matter of law, have specifically intended to use unreasonable force. Here, the jury was led to believe that no intent beyond the bare volition to do whatever act turns out to be

objectively unreasonable, is required.

The "specific intent" element is vacuous if it requires only that the act by which unreasonable force is applied be a "volitional act" because no criminal intent would then be required.

Since it is reasonably possible that the jury's understanding was the defendant did not have to specifically intend to use excessive force, the verdict violates due process and requires reversal under *Estelle* v. *McGuire*, 502 U.S. -, 116 L.Ed.2d 385, 112 S.Ct. - (1991) (and cases cited therein).

The prosecutor also told the jury: "You decide what conduct is acceptable by your police. And what conduct violates the law." And he told them that the real question the jury was to answer [by their verdict] was how future police officers would be taught -- whether they should be taught that they should use their baton to beat suspects into submission. This interpretation of the jury's duty created a reasonable probability that the jury understood it was to convict appellants if they "later hold" it deprived King of his civil rights. In other words, by leading the jury to believe it could *establish* the standard by its verdict, the conviction became a violation of due process and the ex post facto clause.[40]

Telling the jurors to disregard what the defendant thought was reasonable and to use their verdict to tell the police department how to train future police in the use of the baton, and to determine in general what conduct is (objectively) reasonable for the police to engage in, asks them to completely disregard the intent element of this crime. It allowed the jury to say, even

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[40] *Screws* v. *United States*, *supra*, 325 U.S. at 97, 65 S.Ct. at 1033. [Holding that it would be unconstitutional if the law punished an officer for "an act which some court later holds deprives a person of due process."] (See also *United States* v. *Reese*, *supra*, 2 F.3rd at 880.)

if the officer honestly believed he was using, and intended to use only reasonable force, if we the jury, objectively, think the force he used was unreasonable, that is sufficient to convict him. Petitioner POWELL's good faith (but erroneous) belief that his use of force was reasonable became irrelevant to the jury's decision whether to convict him, and the failure of the Court to ensure he could not be convicted if he did, in good faith, honestly believe the force he used was reasonable, (even if it was not, objectively), requires reversal.

Using the "objective" standard from *Graham* combined with the Circuit court's *misreading* of the standard of "willfulness" and "specific intent" found in *Screws* deprived him of due process, and permitted the jury to convict without finding each essential element of the crime to be proven beyond a reasonable doubt.

The focus of the decision in *Graham* [as well as in the case it relied upon, *Tennessee* v. *Garner*, 471 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)] is the standard under which a civil claim against a law enforcement for excessive force is to be judged. This Court also noted that the question was whether the force used was "reasonable" and that a proper application of the Fourth Amendment standard requires attention to the facts of the case, including "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396, 104 L.Ed.2d at 455. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies.[41]

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[41] The court said reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

Because it was a civil claim for damages filed under Section 1983 *against* the officers, the issue there was "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (cites omitted)" The issue of jury instructions in a criminal civil rights case was not even considered.

In *United States* v. *Guest*, *supra*, 383 U.S. 745, also relied upon by the Ninth Circuit, the majority opinion authored by Mr. Justice Stewart barely touched on either the *mens rea* of a violation of the criminal civil rights statute,[42] stating only that "the offender must act with a specific intent to interfere with the federal rights in question"[43] and that "[a] specific intent to interfere with the federal right must be proved, and at trial the defendants are entitled to a jury instruction phrased in those terms."[44]

The *Guest* case lends no support to the contention of the government, or the conclusion of the Ninth Circuit, that the specific intent element of a criminal violation of civil rights can be satisfied by *less* than a specific intent to do an act which is known to exceed the lawful power of the agent performing the act. Nor is such a view supported by this Court's opinion in *Anderson* v. *United States*, *supra*, 417 U.S. 211. There Justice Marshall's focus was whether or not an intentional interference with voting rights fell within the statute, where the primary intent was to interfere with local rather than federal elections, although false federal votes were

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[42] There, the crime charged was conspiracy to interfere with civil rights, under 18 U.S.C. § 241.

[43] 383 U.S. at 754, citing *Screws* v. *United States*, *supra*, 325 U.S. 91, and the dissenting opinion in *Williams* v. *United States*, *supra*, 341 U.S. 70, 93-95.

[44] 383 U.S. at 760, again, citing *Screws* v. *United States*, *supra*, 325 U.S. 91, 106-107.

also cast to conceal the false local votes. *Anderson* v. *United States*, *supra*, 417 U.S. at 222-223. The Court never even touched on the question presented here, how the jury must be instructed. It was there said, "since the gravamen of the offense under § 241 is conspiracy, the prosecution must show that the offender acted with a specific intent to interfere with the federal rights in question. See *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *Screws* v. *United States*, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 A.L.R. 1330 (1945)."[45] But this statement appears to add nothing to an understanding of the specific intent or willfulness requirement, or to even have been written with jury instructions in mind. Returning to the specific intent requirement in that case the Court said:

> "The specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expression of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots." 417 U.S. at 226.[46]

But, when the Court did discuss the question whether the jury was properly instructed on the specific intent requirement, the issue related only to whether the instructions should have stated that a specific intent to cast a false ballot *in a federal election* was required, or if the specific intent to cast a false ballot was sufficient. The Court specifically declined to resolve this issue, despite a pointed dissent on precisely this question.

While is clear that to be guilty of the crime proscribed by Title 18 U.S.C. Section 242, in the context of an accusation of excessive force in the arrest of a suspect, a police officer must

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[45] *Anderson* v. *United States*, *supra*, 417 U.S. at p. 223.

[46] Citing and quoting from *United States* v. *Saylor*, 322 U.S. 385, 88 L.Ed. 1341, 64 S.Ct. 1101 (1944).

actually violate the suspects civil rights, by, e.g., using excessive force,[47] it is also beyond dispute that not all actionable violations at the hands of the police are *ipso facto* criminal violations, in contravention of Section 242.

Rather, the "use of excessive force" [judged by an objective standard], or the "violation of a civil [Fourth Amendment] right" is necessary, but is not, in and of itself, sufficient to establish a violation of the criminal law. If it were otherwise, Section 242 would have created a strict liability crime -- and it is hardly likely that such was the intent of congress.[48]

Under *Screws* v. *United States*, *supra*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed.2d 1495, the instructions in this case allowed the jury to convict without finding the element of willfulness, or specific intent was proven.

In *Screws*, three state law enforcement officers beat a black man to death after transporting him to the jail in handcuffs, claiming he went for a gun when he alighted from the police car. The beating continued for between 15-30 minutes after he fell to the ground until he was unconscious, and he died shortly thereafter. *Screws* v. *United States*, *supra*, 325 U.S. at 92, 65 S.Ct. at 1031, 89 L.Ed. 1495.

The court charged the jury that "due process of law gave one charged with a crime the right to be tried by a jury and sentenced by a court. "On the question of intent it charged that

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[47] Appellant contends that if *Graham* v. *Conner*, *supra*, has any relevance at all to a *criminal* case, it would be to this first element. There must be, objectively, a violation of the civil (or in this case Fourth Amendment) rights of someone. The question arises, however, how can those cases which are criminal violations of civil rights be distinguished from non-criminal violations?

[48] Suffice it to say, Congress would not have been likely to use phrases like "whoever, . . . *willfully subjects* any inhabitant of any state, . . . to the deprivation of any rights . . .." violates the criminal statute.

'* * * if these defendants, without it being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia.'" *Id.*, 325 U.S. at 93, 65 S.Ct. at 1032.

This Court considered the impact of permitting a conviction to stand where no specific intent need be proven.

> "Under that test a local law enforcement officer violates s. 20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials - police, prosecutors, legislators, and judges - would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment. * * * Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea." *Id.*, 325 U.S. at 96-97, 65 S.Ct. at 1033.

Relying on the word "willfully" in the statute, however, the Court held specific intent *is* required to establish the crime of "willfully * * * [causing] deprivation of any right..."[49]

> "But, 'when [willfully is] used in a criminal statute, it generally means an act done with a bad purpose.' *United States* v. *Murdock*, 290 U.S. at page 394, 54 S.Ct. at page 225, 78 L.Ed. 381 . . . In that event something more is required than the doing of the act proscribed by the statute. . . . An evil motive to accomplish that which the statute condemns becomes a constituent element of the

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[49] The statute is a former version of the statute petitioner here were convicted of violating, which reads: "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights . . . shall be . . . fined or imprisoned not more than ten years. * * *"

crime. (cites omitted). And that issue must be submitted to the jury under appropriate instructions." *Id.*, 325 U.S. at 101, 65 S.Ct. at 1035.

The Court went on to make clear that a the "willful" element is met only by a bad purpose of depriving the victim of a protected right.

> "We repeat that the presence of a bad purpose or evil intent *alone* may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitution-ality on the ground of vagueness. [¶] * * * This requirement is met when a statute prohibits only 'willful' acts in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him (See *Connaly* v. *General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322) for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right. See *Gorin* v. *United States*, 312 U.S. 19, 27, 28, 61 S.Ct. 429, 433, 434, 85 L.Ed. 488." *Screws* v. *United States*, 325 U.S. at 103-104, 65 S.Ct. 1036-1037, 89 L.Ed. 1495.

Finally, the Court noted that only when construed in this manner, would the statute avoid the problems inherent in a strict liability crime.

> "The Act would then not become a trap for law enforcement agencies acting in good faith. 'A mind intent on a willful evasion is inconsistent with surprised innocence.' (cite omitted)." *Id.*, 325 U.S. at 104, 65 S.Ct. 1037, 89 L.Ed. 1495.

In the present case the defendants argued they did not intend to use more force than was necessary under the circumstances, but the jury was not instructed that to be guilty they must have intended to do so. Rather, the jury was told that if the in fact use more force than was necessary and, if, further, they intentionally used the force they used, they were guilty. That construction does not comport with the reasoning of *Screws*, or of due process.

Since there is a reasonable probability that the jury interpreted or understood the law in a way to permit it to convict without finding each element of the crime true, or in an

unconstitutional way, the error requires reversal. *Estelle* v. *McGuire*, - U.S. -, 116 L.Ed.2d 385 (1991); *Cupp* v. *Naughton*, 414 U.S. 141, 147, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

4. Certiorari should be granted to resolve a sharp conflict in the Circuits in the essential approach to reviewing departures under the United States Sentencing Guidelines, and in the correct analysis of the particular categories of downward departure involved in this case?

Two departure issues under the United States Sentencing Guidelines are presented by this Petition,[50] and a profound dispute among the Circuits as to the correct overall approach to the issue of departure by District Courts is at stake.

The District Judge here departed 8 levels below the applicable guidelines sentencing range, and made extensive findings of fact based on the record.[51]

At issue is whether the straight-jacketed approach of the panel below should prevail in departure questions, or whether the better reasoned approach of the court in *United States* v. *Rivera*, 994 F.2d 942, 952 (1st Cir. 1993), which recognizes the unique role of the District Court in identifying a case as unique or unusual should govern review of District Court departures (up or down).

Petitioner believes, for the reasons stated in the eloquent opinion of Judge Reinhardt dissenting from the denial of rehearing *en banc* in this case, in which eight other Judges of the Ninth Circuit, representing a broad range of judicial philosophy, concurred, is a persuasive

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[50] Combination of non-prohibited factors vs. "appropriate" factors; Victim provocation that precipitates an *immediate* response vs. victim provocation that substantially contributes to the danger presented, or is an extended course of conduct.

[51] See 833 F.Supp. 789.

argument for (a) this Court to grant Certiorari in this case; and (b) adopting the opinion of Judge Bryer in *United States* v. *Rivera* as stating the correct general approach to departure issues.

A sentencing court may depart from the Guidelines under 18 U.S.C. § 3553(b):

> "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." [Italics supplied.]

In the case of downward departures, the Courts have rejected efforts by the Government to limit this power of the district court, so long as the district court has evidence of one or more mitigating factors which is not adequately taken into consideration by the Sentencing Commission.

Once the Court has identified one, or more than one, lawful basis for a downward departure, the Court may determine the degree of departure that is appropriate based on *all* the facts and circumstances in the case, whether or not each would justify a departure if considered alone. In *United States* v. *Cook*, 938 F.2d 149 (9th Cir. 1991), the Court of Appeals held that a "unique combination of factors" may constitute a "mitigating circumstance" which would justify a downward departure, even though no single factor would justify a departure when considered alone. *Id.* at 153; *accord United States* v. *Anders*, 956 F.2d 907, 911 (9th Cir. 1992); *United States* v. *Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), corrected, 956 F.2d 203 (9th Cir. 1992); see also *United States* v. *Sklar*, 920 F.2d 107, 117 (1st Cir. 1990) ("We do not mean to imply . . . that factors, inadequate to warrant departure when taken in isolation, may not in combination suffice to remove a case from the heartland . . ."). Such a departure may be appropriate when "'a court finds an atypical case,' one 'where conduct significantly differs

from the norm.'" *Cook*, 938 F.2d at 153 (quoting U.S.S.G. Ch. 1, Pt. A, § 4(b)).

As Judge Noonan has cautioned:

> In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision. *Cook*, 938 F.2d at 153.

In addition, the facts of this case are an excellent vehicle for resolving the conflict created between the circuits in the interpretation of U.S.S.G. § 5K2.10, relating to victim provocation.

In this case, if the conduct of the victim may be viewed as mitigating, it would appear to be an excellent factor to serve as a basis for departure, precisely because the Guidelines do not include any specific adjustments for victim conduct that is mitigating.

Under the general principles set forth above, then, victim conduct that mitigates the "offense conduct" in this case would appear to fit into the rationale of 18 U.S.C. § 3553(b)[52]:

> ". . . as a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines" (See also U.S.S.G. § 5K2.10 (Policy Statement) [same].)

Since the mitigating circumstance of victim conduct is not "taken into consideration" at all in computing the Guidelines Sentence, it clearly is a legitimate basis for downward departure.

Moreover, the Guidelines Commission specifically authorized downward departure on the basis of victim conduct. U.S.S.G. § 5K2.10 provides:

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[52] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." [Italics supplied.]

"If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics in comparison to those of the defendant;
(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;
(d) the danger actually presented to the defendant by the victim; and
(e) any other relevant conduct by the victim that substantially contributed to the danger presented."

In this case the district court departed on the basis of the fact the Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. The government did not seriously contend that Mr. King's conduct was lawful. The evidence presented at trial established that Mr. King was not merely that of a "disrespectful and obstreperous drunk." He was acting in a manner that far exceeded such benign conduct. In fact, the district court concluded, based on the trial evidence that:

1. Mr. King acted in a dangerous manner in his conduct of recklessly evading detention and arrest by driving at high rates of speed to avoid being stopped at all by the police. This conduct was life threatening.

2. Did not obey police commands to submit to police authority.

3. Resisted lawful arrest to such an extent that (it is undisputed) the police *lawfully* used deadly force, in the form of a taser to subdue him.

4. Even after being tased, he posed a perceived danger to Defendant Powell, by continuing to refuse to obey police commands, by refusing to submit to arrest, and by actively

resisting arrest.[53]

5. During this period, he posed a physical threat to Defendant Powell by getting up and running in his direction. "He then rapidly rose to his hands and knees, and to his feet. He turned, outstretched his arms forward, and charged towards Officer Powell."

All of this conduct was engaged in by a person who was, in fact, a convicted felon, who had not been searched, and who the district court found officers could reasonably believe was on PCP.[54] This wrongful conduct of the victim forms a powerful basis for a downward departure in this case under the factors listed in §5K2.10. Looking at those listed factors in turn, they each support the district court's decision to departure.

The "size and strength" of Mr. King at the time of the offense conduct in this case was referred to by the district court in its findings of fact.[55]

Moreover, another "relevant physical characteristic" in this case includes the fact that he was tased, but could still control his motor functions, get up, and charge Defendant Powell.

At the very least, the reasonable perception of one in Defendant Powell's position would be that Mr. King possessed remarkable physical strength after apparently (at least) being tased by Sgt. Koon.

Again, there is little doubt that in this case Mr. King "persisted" in his dangerous actions. He did not yield during a high speed auto chase, and he continued to resist arrest as police

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[53] "He resisted and became combative, forcing the officers to retreat."

[54] "because of Mr. King's erratic and recalcitrant behavior."

[55] "Mr King was a large muscular man and a felony suspect. Sergeant Koon testified that he thought Mr. King may have been recently imprisoned because Mr. King appeared to have engaged in bodybuilding common among prison inmates."

commands and use of force escalated. Defendant Powell did approach Mr. King to cuff him prior to the point at which Mr. King arose. If he had succeeded in cuffing Mr. King, the confrontation that included the "offense conduct" would have been avoided.

Given the information Defendant Powell had about Mr. King's ability to, and apparent determination to, effectively continue to resist lawful commands of the police both before and after the taser was used, Defendant Powell "reasonably perceived" that he was very dangerous. This perception was, reasonably, heightened by two factors: (i) an objectively reasonable assumption by a police officer in Defendant Powell's position that Mr. King was under the influence of PCP, or some similar stimulant; (ii) Defendant Powell's role in the arrest of Mr. King.[56]

Considering the potential that Mr. King was possessed of chemically enhanced strength and resolve, Defendant Powell could reasonably have perceived his conduct to pose a very serious threat of harm to him and his fellow officers.

Furthermore, considering the fact that when he is acting lawfully, properly, and within L.A.P.D. policy, an officer in Defendant Powell's position is not trained to act unilaterally, but is trained to rely in large measure on information being relayed to him by the Sergeant in charge of the arrest, Defendant Powell would reasonably have perceived Mr. King to be very dangerous indeed, since Sgt. Koon was yelling to him to administer more and more frequent baton blows to Mr. King to subdue him.

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[56] As discussed below, the uncontroverted evidence at trial was that when an unsearched suspect is resisting arrest, it is the responsibility of the ranking officer to take charge of the scene, and it is the responsibility of the officers actually effecting the arrest to rely on information given to them by the officer in charge from a more objective vantage point.

Mr. King was an unsearched felon, on parole, who was willing to endanger lives in order to evade arrest while in his car, who withstood a taser charge, who persisted in disobeying police commands despite the presence of a sizable number of uniformed, armed police officers, who physically resisted arrest, and who was capable and willing to stand up from a prone position and move in the direction of officer Powell.[57]

Mr. King "actually presented" a danger to appellant.

Despite repeated commands to him and the lawful use of the very formidable device of a taser gun, Mr. King refused to comply, or to show his hands, or keep them away from his mid-section where he could have concealed a weapon. Clearly, in the situation confronting the defendants, the lack of knowledge that Mr. King was not armed, and his conduct in preventing the officers from searching him, and preventing the officers from immobilizing his hands (by cuffing, e.g.) substantially contributed to the danger he and his conduct presented.

In addition, his "bizarre" behavior, such as dancing and acting in a boisterous, disrespectful, and obstreperous manner also contributed to the danger he presented *in light of the other facts discussed above.* This conduct by a detainee who was very actively resisting lawful arrest in the early moments of the police encounter would make any person in Defendant Powell's position extremely wary since it made Mr. King appear to be not only dangerous, but especially dangerous because he was unpredictable. He acted in a way that was irrational,[58]

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[57] Again, the district court identified this factor in its Sentencing Memorandum, 833 F.Supp. 769.

[58] If only because he appeared to be willing to resist arrest against great odds of numbers of police officers.

and simply strange.[59]

Such conduct may always be said to be unsettling, but when it is manifested by a man who has already engaged in life threatening behavior (recklessly evading the police), who has also taken a taser jolt and gotten back up on his feet within seconds, this strange conduct would be more than merely unsettling, it would be reason to fear that man as a substantial danger.

Again, Judge Reinhardt's dissent demonstrates that the panel opinion is in error in too narrowly construing the reach of that section which specifically authorizes downward departure on this ground. The panel decision below is directly in conflict on this point with the Eighth Circuit's opinion in *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). There, the court found the victim's behavior which preceded the violent assault of the victim (stabbing) to have justified the district court in departing substantially below the applicable guideline sentence.

In that case the defendant was convicted of stabbing the victim in the chest with a nine inch knife requiring emergency medical attention and hospitalization.

The district court imposed a fifteen month sentence for the crime of assault resulting in life threatening injuries with a dangerous weapon. This was a substantial departure below the applicable guideline range and it was imposed on the basis of the victim's antecedent conduct under U.S.S.G. § 5K2.10 (Policy Statement), which defendant here also relies upon.

While characterizing the victim's conduct as "consensual sexual foreplay" the government appealed the sentence asserting that the district court's departure from the Guidelines was (1) based on clearly erroneous factual findings; (2) based on mitigating factors adequately taken into

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[59] This behavior was so "bizarre" and potentially dangerous that CHP officer Melanie Singer, in the early stages of the encounter with King, found it necessary to draw her weapon.

account by the Guidelines; and (3) unreasonable. (*United States* v. *Yellow Earrings*, *supra*, 891 F.2d 650, 651-652) The Court held:

> "The Government contends that the district court improperly considered victim conduct as a mitigating factor warranting departure. Specifically, the Government contends that the Guidelines permit departure only for wrongful victim conduct and then only to the extent merited by the factors set out in section 5K2.10. According to the Government, Struder's conduct fails to satisfy either criteria. The Government's arguments to this effect border on the frivolous."

The activity that provoked the stabbing in *Yellow Earrings*, *supra*, was not contemporaneous with the crime. Nor did the crime follow immediately after the provocation. Rather, the sexually offensive remarks of the victim were made prior in time to his return to the room where the defendant had armed herself with a large knife, and stabbed him. The government argued there that since the offense was not immediately tied up with the offense, it was not provoked by the conduct within the meaning of U.S.S.G. § 5K2.10. The Eighth Circuit rejected this argument, finding that the offense was provoked by the antecedent activity, even though it had ceased when the crime was occurred. This Court improperly acted as a fact finder in determining that the antecedent behavior of Mr. King did not provoke the criminal activity of the defendant -- despite the District Court's conclusion it did.

In fact, by focusing on a finding of the trial court that at the time of the offense conduct, Mr. King "was no longer resisting arrest...[and] posed no objective threat, and the defendant's had no reasonable perception of danger" (Opinion, p. 9436) the panel opinion looked to the wrong facts. That conclusion is the *only reason* the District Court found the conduct of appellant to be criminal. It does not justify the further conclusion (reached by the panel) that the offense conduct was not provoked within the meaning of § 5K2.10. If Mr. King were resisting arrest or posing an objective threat or reasonable perception of danger, there would

have been no crime at all. No where does the guideline require a "reasonable perception of danger" before a finding of victim provocation is appropriate.

There can be no doubt that the parallels between the cited case and the present case are substantial. The Court in *Yellow Earrings* noted:

> "The above evidence demonstrates that Struder, at the very least, pushed Yellow Earrings, verbally abused her and attempted to publicly humiliate her when she refused his request for sexual intercourse. In addition, Yellow Earring's personal recounting of the incident strongly suggests that had Struder accepted "no" for an answer in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." 891 F.2d at 650.

Clearly, the events that were held "provocative" of the offense conduct, preceded it. Just as clearly, here as in the cited case, the offense conduct flowed from lawful conduct that responded to the victim's improper conduct, and it can be said that if Mr. King had responded to the lawful commands of the officers "in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." This is not an argument that the officer's conduct was excused, but it is one that the panel did not take account of in rejecting the District Court's bases for downward departure, despite the citation of *United States* v. *Yellow Earrings*, *supra*, by the District Court and appellants.

Disparate conclusions among the circuits concerning the proper role of departure under the United States Sentencing Guidelines cries out for this Court's guidance. This Court is urged to grant Certiorari to lend that guidance.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Circuit Court affirming Petitioner's conviction and reversing the sentence.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 10th day of April, 1995.

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APPENDIX

Opinion Below

United States vs. Koon and Powell, 34 F.3d 1416 (9th Cir. 1994)
filed August 4, 1994 . . . . . **Appendix 1.**

Amended Order Denying Rehearing and Dissents from Denial of Rehearing *En Banc*

United States vs. Koon and Powell, [NP]
filed January 12, 1995 . . . . . Appendix 2.

Amended Order Denying Rehearing and Dissents from Denial of Rehearing *En Banc*

United States vs. Koon and Powell, 45 F.3d 1303 (9th Cir.)
filed February 2, 1995 . . . . . Appendix 3.

APPENDIX 1

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. STACEY C. KOON, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50561 93-50608 D.C. No. CR-92-00686-JGD-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. LAURENCE M. POWELL, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50562 93-50609 D.C. No. CR-92-00686-JGD-2 OPINION

Appeals from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
May 2, 1994—Pasadena, California

Filed August 19, 1994

Before: James R. Browning and Betty B. Fletcher, Circuit Judges, and James M. Fitzgerald,* District Judge.

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Opinion by Judge Fletcher

SUMMARY

Criminal Law and Procedure/Sentencing/ Individual Rights

The court of appeals affirmed in part a district court judgment of conviction and sentence, vacated the judgment in part, and remanded for resentencing. The court held that the district court erred in departing downwardly on police officers sentences for deprivation of rights under color of state law, where the departures were based on the officers' susceptibility to prison abuse, administrative proceedings to which the officers would be subjected, the absence of a need to protect the public from future wrongdoing, and the unfairness of successive state and federal prosecutions for the same conduct.

After Rodney King's vehicle was observed speeding, Los Angeles Police Department (LAPD) units, including one manned by appellant Laurence Powell, pursued the vehicle. King pulled his car over, and officers ordered him and other occupants of the vehicle to get out of the vehicle and lie on the ground. King got out of the car, but did not lie down. Appellant LAPD Sergeant Stacey Koon arrived and took command. Officer Ted Briseno arrived soon after.

King eventually got down on his hands and knees, but did not get into the requested position. Officers attempted to place him in the position, but King became combative. Koon fired taser darts into King. Events occurring next were captured on a videotape (the Holliday videotape) which shows that King got to his feet in an attempt to escape. Powell and another officer began to strike King with their batons. King fell to the ground and attempted to rise. Briseno put his hand on Powell's baton. When King attempted to get up, Powell again

struck him with his baton. Powell struck King repeatedly; one or more of his baton blows fractured King's leg. Powell struck King in the chest or abdomen, and then King rolled onto his stomach. Officers stepped back for about ten seconds and Powell began to reach for his handcuffs. Briseno used his foot to stomp King in the upper back or neck. Powell began to strike King again with a baton. King was handcuffed and taken to the hospital.

Koon, Powell, Briseno and another officer, Timothy Wind, were tried in state court on charges of assault with a deadly weapon and excessive use of force by a police officer. Briseno testified that excessive force was used but that he had tried to prevent its use. The other three officers' defense was that the force used during the arrest of King was justified and not excessive. The officers were acquitted on all charges except for one count against Powell on which the jury hung.

A federal grand jury indicted the four officers. Powell, Wind and Briseno were charged with, among other things, willfully depriving King of his constitutional rights in violation of 18 U.S.C. § 242. Koon was charged with willfully permitting the other officers to unlawfully strike King and willfully failing to prevent the assault of King by officers in his presence. A videotape recording of Briseno's testimony in the state court proceedings (the Briseno videotape) was played as part of the government's rebuttal case. Briseno testified that Powell's first blow hit King in the face, and that the officers continued to strike King with the baton when he was neither aggressive nor combative. At the state trial, Briseno had been cross-examined by all three of his codefendants, as well as the prosecutor. During its rebuttal closing argument, the prosecution made remarks regarding the "horror and outrage" evoked from "Paris to Tokyo" by the Holliday video.

Briseno and Wind were acquitted. Powell and Koon were found guilty of violating § 242. At sentencing, the district court declined to impose a four-level upward adjustment for

serious bodily injury, because it found that King's serious injuries were sustained at a time when the officers were using lawful force. The court departed downward five levels for victim misconduct. The court also departed downward three levels based on a combination of three factors: 1) the "additional punishment" Koon and Powell would receive on account of their unusual susceptibility to prison abuse and the administrative LAPD proceedings to which they would be subjected; 2) the extreme absence of a need to protect the public from future wrongdoing; and, 3) the unfairness of successive state and federal prosecutions for the same conduct.

Koon and Powell appealed their convictions, contending that admission of the videotape of Briseno's state court testimony was erroneous. They also contended that the introduction of Briseno's state trial testimony violated their Fifth Amendment rights because Briseno was exposed to compelled statements that they made to the LAPD Internal Affairs Division prior to testifying. They further contended that the district court erred in refusing to grant them a hearing on their claim of double jeopardy. Koon and Powell also contended that the prosecutor's statements during its rebuttal closing argument were improper and prejudicial. Additionally, Koon contended that the instructions relating to deprivation of rights in his case were erroneous. The government appealed Koon and Powell's sentences.

[1] Koon and Powell had a full and fair opportunity to cross-examine Briseno in the state trial. The absence of certain enhancements to the Holliday videotape at the state trial did not amount to a lack of opportunity to cross-examine. [2] In addition, there was no suggestion that Koon and Powell's motive for cross-examining Briseno changed from the first to the second trial. [3] No error was committed in the admission of the Briseno videotape.

[4] The prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defen-

dant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify. [5] The district court held a hearing and concluded that Briseno's testimony was not tainted by the exposure to the compelled statements. Such a factual finding was not clearly erroneous; [6] the record reflected a legitimate independent source of information with respect to each matter as to which Briseno testified.

[7] There was no evidence that the federal prosecution was a "sham" or "cover" for the state prosecution. Thus, the district court did not abuse its discretion in denying Koon and Powell's motions for an evidentiary hearing on their double jeopardy claim.

[8] Although the prosecution's remarks regarding the "horror and outrage" evoked by the Holliday video went beyond the bounds of appropriate advocacy and were improper, [9] the government's behavior did not constitute plain error. [10] The misconduct by the prosecution was partially invited, isolated, and of limited severity. [11] The jury's ability to weigh the evidence impartially was not materially affected by the improper remarks.

[12] Koon argued that the district court erred by drawing the definitions of both unlawful force and custody from the context of Fourth Amendment law, when the indictment charged him with depriving King of Fourteenth Amendment rights. [13] The district court, however, stated the law correctly. [14] Even in the context of an alleged deprivation of Fourteenth Amendment rights, it was altogether proper for the district court to use a Fourth Amendment excessive force benchmark when describing the harm an officer was obligated to protect a custodial suspect from suffering at the hands of other police officers. [15] There was no error in the jury instructions.

[16] Personal and professional consequences that stem from a criminal conviction are not appropriate grounds for

departing, nor are they appropriately considered as part of a larger complex of factors. They are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes. [17] The district court's reliance on the "additional punishment" flowing from Koon and Powell's criminal conviction, therefore, was impermissible. [18] In addition, Koon and Powell's vulnerability to prison abuse rested solely on their status as police officers and on the public outrage that their crime engendered. [19] A departure based on an individual's occupation or notoriety would be inconsistent with the structure and policies of the Sentencing Guidelines.

[20] That Koon and Powell are neither dangerous nor likely to commit crimes in the future was not an appropriate basis for a departure in this case. The Sentencing Commission already took this factor into account when it drafted the Guidelines. [21] The Commission expressed disapproval of sentencing courts' departing below the range for the relevant category that already reflects the lowest risk.

[22] Reliance on the "spectre of unfairness" of dual prosecutions to support a departure was improper because it spoke neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern. [23] Thus, consideration of any of the factors identified by the district court to support the three-level departure, separately or collectively, was inconsistent with the structure and policies of the Guidelines.

[24] The district court's downward departure for victim misconduct was also not justified. The court adopted an approach toward official misconduct which was antithetical to the approach embodied in the applicable Guideline.

COUNSEL

Joel Levine, Encino, California; William J. Kopeny, Santa Ana, California, for the defendants-appellants-cross-appellees.

Steven D. Clymer, Assistant United States Attorney, Los Angeles, California; Irv Gornstein, Civil Rights Division, United States Department of Justice, Washington, D.C., for the plaintiff-appellee-cross-appellant.

OPINION

FLETCHER, Circuit Judge:

Stacey Koon and Laurence Powell ("appellants") appeal their jury convictions for deprivation of rights under color of state law in violation of 18 U.S.C. § 242. The United States appeals Koon's and Powell's sentences under the Sentencing Guidelines. We affirm the convictions but remand for resentencing.

BACKGROUND

The arrest of Rodney King occurred in the early morning of March 3, 1991 in Los Angeles. After drinking malt liquor with two friends, King left a suburb of Los Angeles and began driving. At this time he was intoxicated. Officers Melanie Singer and Tim Singer, both California Highway Patrol ("CHP") officers, observed King's vehicle speeding on the 210 Freeway. The officers began to pursue the vehicle and called on the radio for help. Several Los Angeles Police Department ("LAPD") units joined in the pursuit. Among these units was one manned by Powell and his trainee, codefendant Timothy Wind. The pursuit ended when King pulled his car over at an entrance to the Hansom Dam Recreation Area on Osborne St.

The officers ordered King and the other occupants of the vehicle to get out of the vehicle and assume a felony prone position (*i.e.* King was ordered to lie on his stomach with his arms behind his back, legs spread, heels turned toward the ground, and head turned away from the officers). King got out of the car but did not lie down. At this time Sergeant Koon arrived and took command. Police officers Ted Briseno and Roland Solano arrived soon after. The officers again ordered King to lie in a felony prone position.

King eventually got down on his hands and knees, but did not get into the felony prone position. Officers Powell, Wind, Briseno, and Solano attempted to place him in that position using a "team takedown" or "swarm." King became combative and the officers retreated. Koon then fired taser darts into King.

The events that occurred next were captured on videotape by George Holliday (the "Holliday videotape"). This videotape was the focus of much of the testimony at trial and is described in detail in the district court's sentencing opinion. *See United States v. Koon*, 833 F. Supp. 769, 774-80 (C.D. Cal. 1993). The following description of the events tracks the relevant time frames on the Holliday videotape.

As the videotape begins, it shows that King got to his feet in an attempt to escape. Powell and Wind began to strike King with their batons. At trial it was disputed whether Powell's first blow hit King in the head. The district court concluded that Powell struck King's head accidentally. *Id.* at 777. King fell to the ground and attempted to rise. At 18 seconds, Briseno put his hand on Powell's baton, which Powell had raised as he stood above King.

From 18 to 30 seconds, King attempted to get up, and was struck with batons by Powell and Wind. From the 35th second to the 51st second, Powell struck King repeatedly. At approximately 43 seconds, one or more of Powell's baton blows frac-

tured King's right leg. At 55 seconds, Powell struck King on the chest or upper abdomen. After this blow, King rolled onto his stomach and lay prone. At this point the officers suspended the use of force and stepped back for about ten seconds. Powell began to reach for his handcuffs. The district court found this movement to be evidence that Powell perceived King no longer to be a threat. *Id.*

At 1:05, Briseno moved forward and used his left foot to stomp King in the upper back or neck. King's body writhed in response. At 1:07 on the videotape, Powell and Wind began to strike King again with their batons. At approximately 1:29, King put his hands behind his neck and subsequently was handcuffed.

After King was handcuffed, Powell radioed for an ambulance. Powell sent two messages over the Mobile Digital Terminal to other officers that said "ooops" and "I havent [sic] beaten anyone this bad in a long time." Koon sent a message to the police station that said "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time."

King was taken to Pacifica Hospital, where he was treated for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. At the hospital, Powell learned that King worked at Dodger stadium, and said to him, "We played a little ball tonight, didn't we Rodney?" King said, "I don't know." Powell said, "You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs." King responded, "Yeah I guess so." Powell said, "Yes, we played a little ball and you lost and we won."

Koon, Powell, Wind, and Briseno were tried in state court in Simi Valley, California on charges of assault with a deadly weapon and excessive use of force by a police officer. At the trial, Koon, Wind, and Powell's defense was that the force used during the arrest of King was justified and was not

excessive. In contrast, Briseno testified that excessive force was used but that he had tried to prevent its use. The four officers were acquitted on all charges except for one count against Powell on which the jury hung.

On August 4, 1992, a federal grand jury indicted the four officers. Count 1 of the federal indictment charged Powell, Wind and Briseno with willfully depriving King of his constitutional rights in violation of 18 U.S.C. § 242 and with aiding and abetting each other in violation of 18 U.S.C. § 2. Count 2 charged Koon with willfully permitting the other officers to unlawfully strike King and willfully failing to prevent the assault of King by officers in his presence, in violation of 18 U.S.C. § 242.

The case was tried to a jury commencing February 25, 1993. The jury verdicts were handed down on April 17, 1993. Officers Briseno and Wind were acquitted; Officer Powell and Sergeant Koon were found guilty of violating § 242. Koon and Powell were sentenced on August 4, 1993 to thirty months imprisonment and two years of supervised release. *See Koon*, 833 F. Supp. at 792. Appellants timely appealed their convictions and the government timely appealed the sentences. We have jurisdiction.

DISCUSSION

A. *Admission of Briseno's State Trial Testimony*

Before trial, the government moved to admit a videotape recording of codefendant Briseno's testimony in the state court proceeding. The videotape, which was ultimately played as part of the government's rebuttal case, was the subject of many motions in the district court, and continues to be the subject of various claims on appeal.

Briseno's testimony was highly damaging to Koon and Powell. He testified, among other things, (1) that Powell's

first blow hit King in the face — which was inconsistent with Powell's position at trial; (2) that Powell delivered a second series of much more forceful blows to King "from the shoulder up"; (3) that Briseno couldn't see or understand what justified the other officers' behavior; (4) that Briseno grabbed Powell's baton and told him to "get the hell off" King; (5) that Briseno yelled to Koon "what the fuck [is] going on out here," but Koon did not respond; (6) that the officers continued to strike King with the baton when he was neither aggressive nor combative; and (7) that Briseno went to the police station after the incident intending to report the use of force.

At the state trial, Briseno was cross-examined by all three of his codefendants as well as the prosecutor, who spent part of his time trying to establish Briseno's own culpability. On both direct and cross-examination, Briseno stated repeatedly that he thought the other officers had acted wrongly. These statements of opinion were redacted from the videotape played at the federal trial.

On appeal, Koon and Powell contend that admission of the videotape violated their Confrontation Clause rights. They also argue that the videotape should not have been admitted as rebuttal evidence, and that it contained improper lay opinion evidence.

1. *Confrontation Clause Challenge*

"The Confrontation Clause promotes accuracy in the criminal process by ensuring that the trier of fact has a satisfactory basis for evaluating the truth of out-of-court statements." *Barker v. Morris*, 761 F.2d 1396, 1399 (9th Cir. 1985) (citations omitted). When a hearsay declarant is unavailable to testify at trial, his out-of-court statements may be admitted without violating the Confrontation Clause so long as those statements bear sufficient indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987). "[N]o independent inquiry into reliability is required" under the Confronta-

tion Clause, however, when the out-of-court statements "fall within a firmly rooted hearsay exception." *Id.* at 183. Since Rule 804(b)(1) is a firmly rooted exception to the hearsay rule, *Mattox v. United States*, 156 U.S. 237 (1895) (discussing history of the exception); *United States v. Kelly*, 892 F.2d 255, 262 (3d Cir. 1989) (collecting authorities), *cert. denied*, 497 U.S. 1006 (1990), our analysis focuses on whether the district court erred under Rule 804(b)(1) in admitting Briseno's former testimony.[1]

Under Rule 804(b)(1), testimony from another proceeding is not excluded by the hearsay rule if the declarant is unavailable,[2] and if "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Appellants argue that the Briseno videotape should not have been admitted because at the state trial they lacked sufficient opportunity to cross-examine Briseno. Appellants point out that in the state proceeding they did not have the benefit of various enhancements to the Holliday videotape which were available at the federal trial.[3]

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[1]The parties debate whether, given this collapse of the constitutional analysis into the Rule 804(b)(1) analysis, the abuse of discretion standard which governs admission of Rule 804(b)(1) evidence should apply, *see United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984), or whether the court should review de novo those Rule 804(b)(1) cases in which a constitutional claim is raised. We need not decide the issue, however, because we conclude that appellants cannot prevail under either standard. *See United States v. Payne*, 944 F.2d 1458, 1468 n.9 (9th Cir. 1991).

[2]Appellants do not dispute that Briseno, who chose not to testify in the federal trial, was "unavailable."

[3]Three enhancements were used at the federal trial: (1) the "filtered audiotape," which filtered out helicopter noise and purportedly made audible certain commands by Koon as well as the sounds of a taser being activated just before King went down (prepared by the defense); and (2) the "zoom videotape," which blew up the frames showing Powell's first blow

[1] We reject appellants' argument. Appellants had a full and fair opportunity to cross-examine Briseno in the state trial. Indeed, they do not argue that the state court in any way interfered with their ability to carry out an effective cross-examination. They instead claim that the absence of the enhancements to the videotape at the state trial amounts to a lack of opportunity. We disagree. The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine. *See Thomas v. Cardwell*, 626 F.2d 1375, 1386 n.34 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981). In *Thomas*, the prosecution introduced, at defendant's second trial, the testimony of a witness from defendant's first trial who had become unavailable. *Id.* at 1384. By the time of the second trial, the defendant claimed to have discovered evidence that this witness was schizophrenic. *Id.* at 1386 n.34. The *Thomas* court rejected the argument that the purported discovery of new evidence established defendant's lack of opportunity to cross-examine the witness at the first trial. After noting that there was no suggestion that the defendant's failure to discover the information was the prosecution's fault, the court explained that

> often information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, that lack of information does not make the

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to King (prepared by the defense); and (3) the "registered videotape," which stabilized the video image (prepared by the government).

In the district court, in addition to arguing that the lack of these enhancements hampered their ability to cross-examine Briseno during the state proceeding, appellants argued that their motive for cross-examination was different in the state than in the federal trial because in the federal trial the prosecution was required to show a higher level of intent.

Appellants have not pursued this latter argument on appeal.

> opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant.

Id.

Much the same applies here. Appellants did not lack the opportunity to cross-examine Briseno; they lacked only some of the tools which were later developed by the government or by appellants themselves, and which appellants argue would have allowed them to cross-examine Briseno to better effect. Appellants' failure to take full advantage of their opportunity to cross-examine in the first trial — by developing those tools earlier — cannot alter the fact that they *had* that opportunity. *See United States v. McClellan*, 868 F.2d 210, 215 (7th Cir. 1989) ("the emphasis in [the Rule 804(b)(1)] inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place"); *United States v. Salim*, 855 F.2d 944, 953-54 (2d Cir. 1988) (under Rule 804(b)(1), defendant is entitled to " 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' ") (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)) (emphasis in original).[4]

In addition to a full opportunity, Rule 804(b)(1) requires that appellants' motive in carrying out their state trial cross-examination of Briseno was similar to the motive they would have had in the later proceeding. We conclude easily that it

[4]Appellants argue that the newly discovered information in *Thomas* pertained only to the credibility of the witness, whereas the newly developed enhancements here pertain to the crime itself. Appellants do not explain why this distinction matters, however, and nothing in *Thomas* reveals its significance either. At the state trial, appellants had the opportunity to cross-examine Briseno concerning both extrinsic facts about the charged crime, and circumstances in his own situation which might lessen his credibility. It is that opportunity, rather than the scope or efficacy of its employment, which is important under Rule 804(b)(1).

was. The operative facts and legal issues in the state and federal trials were substantially similar, *see United States v. Salerno*, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J. concurring) (" 'similar motive' does not mean 'identical motive' "), and appellants do not challenge the district court's finding to this effect. Appellants thus had every reason to develop Briseno's testimony in the state trial with an eye to undermining his credibility and casting into doubt his statements about their behavior. *See United States v. Poland*, 659 F.2d 884, 895-96 (9th Cir. 1981) (holding that defendant's motive for cross-examination at suppression hearing was similar under Rule 804(b)(1) to his motive for cross-examination at trial).

Appellants maintain that their position is supported by *People of the Territory of Guam v. Hayes*, 1993 WL 469357 (D. Guam 1993), in which a three-judge panel held that the trial court erred in admitting former testimony because the defendant had not had the same *motive* to cross-examine the witness about certain facts in the first trial as he had in the second trial. However, the *Hayes* court made clear that this difference in motive occurred because "different issues arose at the second trial which [defendant] could not possibly have anticipated at the first trial." *Id.* at *2.[6]

[2] Here, by contrast, there is no suggestion that either the factual nature of the case against appellants or appellants' motive for cross-examining Briseno changed at all from the first to the second trial. All that changed was the technology that appellants might have used to enhance the Holliday vid-

[6]The victim in *Hayes*, "K.," testified at defendant's first trial, but then moved from Guam and was unavailable at the second trial. K's testimony from the first trial was introduced at the second trial. The prosecution also called as a witness Mrs. Muna, who testified about statements made by K. which were *not* disclosed at the first trial. The appellate court concluded that defendant's motive to cross-examine K. was different at the first than at the second trial, because at the first trial defendant did not have "the additional motivation . . . of proving that K. didn't make the statements attributed to her by Mrs. Muna." *Id.* at *2.

eotape as a basis for questions in the cross-examination. Because this change constitutes a deficiency in neither the opportunity to cross-examine nor the motive for doing so, appellants' argument under Rule 804(b)(1) must fail.

2. *Use of Videotape as Rebuttal Evidence*

Appellants next contend that even if there was no Confrontation Clause violation, the district court erred in admitting the Briseno videotape as rebuttal evidence. As district courts have wide latitude in deciding what constitutes proper rebuttal evidence, *Geders v. United States*, 425 U.S. 80, 86 (1976), we review such determinations for an abuse of discretion. *Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

Appellants first argue that Briseno's testimony did not rebut anything presented in their defenses. We disagree. Briseno's testimony rebutted Koon's statement that Powell's first blow struck King on the shoulder area rather than on the head, Koon's expert's testimony that the officers' use of force was justified because King continued to be combative and aggressive, and Powell's former police instructor's testimony that Powell had done nothing he had not been trained to do.

Appellants next argue that even if some portions of the videotape properly rebutted elements of their cases, the district court nonetheless erred in permitting the government to introduce as rebuttal *both* those parts of the videotape which in fact rebutted their evidence, *and* those parts which were offered solely against Briseno.[8] No one suggests that appel-

[8]Briseno neither testified nor presented any evidence on his behalf, save for introducing a single boot, one he had worn the night of the incident. At trial, he argued that his Fifth Amendment rights would be violated if his former testimony was admitted against him on rebuttal despite the fact that he had put on no evidence of his own. He was concerned primarily with those portions of the videotape in which he testified that he went to the police station to file a report on the use of force. The government's position was that Briseno never went to the police station, and that his false exculpatory statement was proof of his consciousness of guilt.

factors into account, and required the government to make the difficult showing that appellants *willfully* came down on the wrong side of the *Graham* standard. Thus the feature which the district court found unusual, and exculpatory, is built into the most fundamental structure of excessive force jurisprudence, and in criminal cases is built in twice.

The district court was troubled by the fact that U.S.S.G. § 2H1.4 applies both to excessive force cases of the *Graham* variety and to cases in which a law enforcement or corrections officer applies force which is unlawful from the beginning. The district court saw the appellants' lawful authority to use or allow the use of *some* force, and what it perceived as the slenderness of the line between legitimate and illegitimate force, as factors partially exculpating appellants. Section 2H1.4, however, adopts exactly the opposite approach. The guideline punishes those vested with governmental authority *more* severely than private actors who are guilty of comparable conduct: this is the reason the guideline starts with the "underlying" offense and then increases the offense level by 6. *See* U.S.S.G. § 2H1.4, comment. (backg'd); *see also* U.S.S.G. § 3B1.3, comment. (backg'd). The fact that appellants were authorized to use *some* force in this case does not mitigate the fact that they used too much. Under the structure and policies of the Guidelines, it makes it worse.

In a great many § 242 cases, the defendant has authority to use appropriate force. The district court's rationale for departure in this case was that here, due to the victim's misconduct, the officers were legitimately called upon to use force *in this particular incident*, and that the incident itself was so volatile that legal force quickly became illegal. But the policy behind the punitive structure of § 2H1.4 does not apply any less to an officer who crosses the line into illegality *after* he begins to apply force to a victim than it does to the officer who crosses that line *as soon as* he begins to hurt the victim. The policy behind the guideline applies with equal or greater force in the former case: the victim who is a wrongdoer is especially vul-

nerable to abuses by officials, because the legitimate sway of authority over him is greater to begin with. The structure of § 2H1.4 suggests that the slenderness of the line separating legal from illegal uses of state power is a reason for victims, and for society, to be especially concerned. It cannot at the same time be a reason to partially excuse those who transgress.[37]

As justification for the five-level departure, the district court relied not only on the conclusion that appellants' offense conduct fell outside the heartland of § 2H1.4 cases, but also on the conclusion that it fell outside the heartland of *aggravated assault* cases (i.e., § 2A2.2). "The stringent aggravated assault Guideline . . . contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for differences between such 'heartland' offenses and the case at hand." *Koon*, 833 F. Supp. at 787. The district court thus drew an implicit contrast between appellants and *civilian* offenders, noting that "Koon and Powell did not seek out a victim; rather, their very

[37]The fact that § 2H1.4, like § 242, encompasses different kinds and degrees of misconduct is in itself insufficient to justify a downward departure. *See United States v. LeBlanc*, 24 F.3d 340, 347 (1st Cir. 1994) (although money laundering offenses which stem from prior unlawful activity of running an illegal gambling business differ from the "classic" offense of laundering drug money, downward departure is impermissible because the offense at issue falls within the plain language of the statute and clearly was intended to be reached by Congress). Appellants' conduct fell squarely within § 242: the statute criminalizes the deprivation of *all* Constitutional rights. *United States v. Price*, 383 U.S. 787, 803 (1966) (discussing legislative history). Hence "once a due process right has been made specific by court decisions, that right is encompassed by § 242." *United States v. Langer*, 958 F.2d 522, 524 (2d Cir. 1992) (internal quotation marks and citations omitted). The rights King was deprived of have been clearly established for decades, and willful conduct which deprived him of those rights falls within the heartland of both the statute and the Guidelines. The fact that willful violators of the rights at issue in this case may not be prosecuted as often as other violators of § 242 does not alter the analysis. In itself it says nothing about individual culpability, although it may say something about evidentiary difficulties and about the litigation strategies of the federal government.

presence at the scene was a consequence of Mr. King's wrongful conduct." *Id.* Similarly, the court noted that "[p]olice officers are always armed with 'dangerous weapons' " — thereby suggesting that application of the weapons enhancement may be unfair in a case where the defendant is a police officer rather than a civilian. *Id.*

But to depart because of a perception that this case falls outside the heartland of aggravated assault cases again subverts the structure of § 2H1.4. That guideline explicitly enhances sentences for official misconduct *beyond* those for civilian misconduct. The Sentencing Commission cannot have been blind to the fact that the circumstances out of which official misconduct arises are different from the circumstances which give rise to civilian misconduct. The Commission, in fact, recognized those differences and used them as the basis for harsher rather than more lenient punishment.

[24] We conclude that the district court's rationale for departing downward is flawed. The court isolated as unusual a factor which is at the very heart of excessive force jurisprudence. The court also adopted an approach toward official misconduct which is antithetical to the approach embodied in the applicable guideline. The five-level downward departure was not justified.[38]

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[38]We do not conclude that a departure for victim misconduct would *never* be permissible in a police case. Such a departure might be appropriate, where, for example, the victim kills or wounds an officer's partner in his presence. In such a case, victim misconduct plays a role similar to that played by provocation in the more usual crimes of passion: the defendant is to a certain extent excused because he was seized by passion, and acted in the heat of the moment. This appears to have been the rationale in those cases where departures under § 5K2.10 were affirmed. *See United States v. Tsosie*, 14 F.3d 1438 (10th Cir. 1994); *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989) (assaults triggered by sexual jealousy or humiliation). This is distinguishable from the district court's rationale, which relies on the vicissitudes of police work, and the difficulty in drawing the line between proper and improper uses of force.

3. *Failure to Adjust Upward Four Points for Serious Bodily Injury*

The district court imposed a two-level upward adjustment for bodily injury under U.S.S.G. § 2A2.2(b)(3)(A), rather than a four-level adjustment for serious bodily injury under U.S.S.G. § 2A2.2(b)(3)(B). The government argues that the latter adjustment is warranted by the blow, administered by Powell 43 seconds into the videotape, which fractured King's leg. The district court acknowledged that this blow caused serious bodily injury, but found that Powell was not acting criminally when he delivered it.

As the government points out, the district court left it unclear whether or not the blow in question constituted excessive force: the court found that the blow "may have been tortious," 833 F. Supp. at 778, but concluded that Powell was not *criminally* liable for the blow, because the court was unable to find that he had intended at that time to use excessive force.[39] *Id.* It is the latter conclusion which the government attacks on appeal.

The district court supported its findings with the following observations: (1) blows to the leg joints are within LAPD policy, if necessary to avert a threat; (2) preceding the blow, the situation had evolved rapidly, and (3) King had tried to rise; (4) even as Powell delivered blows around the time of second 43, King continued to move, and to resist attempts to place him into the felony-prone position. *Id.*

The government contends that these reasons cannot be sustained, and musters countervailing evidence of its own: (1) there is a presumption that people who use unreasonable force

[39]The district court made the same finding with respect to Koon's criminal liability for the leg injury, and for the same reasons. *Koon*, 833 F. Supp. at 779-80. In the remainder of this discussion, references to Powell's liability refer to Koon's as well.

know that it is unreasonable; (2) both Koon and Powell showed an awareness of wrongdoing after the event (by lying and by bragging); (3) Koon and Powell had been taught not to use a baton on a suspect, unless the suspect is combative or aggressive; and (4) there is no reason to distinguish the leg-breaking blow from the later blows which the court found *were* criminal.

None of these arguments establishes that the district court committed clear error.

First, the district court was not bound to embrace the presumption which the government contends should apply. The court's specific findings of fact override general presumptions.

Second, the fact that Koon and Powell may have been conscious of guilt does not show *when* their criminal wrongdoing occurred. Their lies and boasts may have been directed to the later conduct which the district court found was criminal, and not to the earlier conduct. The later blows caused only soft tissue bruising.

Even if Powell's most damaging blow was not authorized by LAPD policy, this does not mean that Powell necessarily intended to use unreasonable force. Police department policy permitted blows to forestall aggressive or combative behavior, and the district court found that King was continuing to move at the time. While such movement may not in fact have been aggressive, it may have appeared so. Powell's reaction could reasonably be found to be an error of judgment rather than an intentional use of excessive force.

Finally, the district court provided a reason to distinguish between the officers' intent at the time of the leg-breaking blow and their intent during the 19 seconds of the videotape in which the court concluded that criminal activity occurred. Those latter 19 seconds were preceded by a period in which

King lay on his stomach, and posed no threat. *Koon*, 833 F. Supp. at 777. The court found no comparable period of compliance preceding the leg-breaking blow.

The government quarrels with the evidentiary basis for this latter finding, and contends that both the Holliday videotape and the testimony of government witnesses establish that King ceased to pose a threat, at the very latest, 30 seconds into the tape. But the defense witnesses testified that King continued to pose a threat at that time. The district court concluded that the videotape was "sometimes an ambiguous record of the crucial events," *id.* at 776, and the conflicting testimony at trial bore this out. Although we may not agree, the district court resolved those ambiguities in favor of the defense. Its resolution was not inconsistent with the verdicts, and the government has not established clear error.

CONCLUSION

We affirm appellants' convictions. After a careful review of the record and the relevant authorities, we are convinced that the district judge correctly resolved each of the legal issues raised by appellants as to the guilt phase of the proceedings. He conducted the trial with impeccable fairness and careful and thoughtful attention to its every aspect. We appreciate the magnitude of the task, given the unusual number and complexity of the issues involved, and the difficult circumstances caused by the extraordinary publicity surrounding every phase of the proceedings. However, we are also convinced that the sentences imposed by the district court are inconsistent with the structure and policies of the Sentencing Guidelines and the federal sentencing statutes, and we therefore vacate the sentences and remand for resentencing consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. STACEY C. KOON, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50561 93-50608 D.C. No. CR-92-00686-JGD-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. LAURENCE M. POWELL, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50562 93-50609 D.C. No. CR-92-00686-JGD-2 ORDER, DISSENT, AND CONCURRENCE

Filed January 12, 1995

Before: James R. Browning and Betty B. Fletcher, Circuit Judges, and James M. Fitzgerald,* District Judge.

ORDER

All of the panel members have voted to deny the petitions for rehearing of both defendants.

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*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Judge Browning and Judge Fletcher have voted to reject the suggestions for rehearing en banc of both defendants and Judge Fitzgerald has so recommended.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote as to whether to take the case en banc. A vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court. Judge Trott was recused.

The petitions for rehearing of both defendants are denied and the suggestions for rehearing en banc of both defendants are rejected.

REINHARDT, Circuit Judge, dissenting, with whom PREGERSON, WIGGINS, KOZINSKI, NOONAN, and HAWKINS, Circuit Judges, join, and with whom O'SCANNLAIN, T.G. NELSON, and KLEINFELD, Circuit Judges, join, except as to Part IV:

I dissent from the refusal to rehear this case en banc. While I agree that there is no prejudicial error that requires reversal of the convictions, I believe that the panel seriously erred in vacating the downward departures ordered by Judge Davies. In my opinion, the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

In stretching to reach its result, the panel casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines. It is only by exhalting the rigid calculations of charts and tables over the judgment of human beings that the panel reaches its conclusion that Judge Davies

was too lenient. The panel's encroachment on district court discretion epitomizes the mechanical and inflexible approach to sentencing that so many critics contend the Guidelines themselves represent.[1] Indeed, under the panel's view of the district judge's role in sentencing, district courts would be divested of much of the limited discretion they retain under the Guidelines. As a result, the panel's opinion would make far worse an already unfair and unjust sentencing scheme. It is difficult to believe that the panel truly wishes such an approach to apply to defendants generally.

The panel's unduly restrictive approach to Guidelines sentencing is not the sole vice in its opinion. The opinion is both internally inconsistent and in direct conflict with our prior holdings. As a result, it does not even have the virtue of clarifying our departure jurisprudence. By refusing to use the en banc process, we miss an important opportunity to provide district judges, including Judge Davies on remand, with clear guidance in the area of downward departures and leave them with little choice but to pick and choose among our various irreconcilable statements.

I.

The district judge sentenced Koon and Powell to 30-month prison terms. He determined the sentences to be appropriate after departing downward from the Guidelines range by a total of eight points. First, he concluded that a three-point departure was in order because of the presence of an unusual combination of factors. Second, he concluded that a five-point departure was justified as a result of victim misconduct. The sentence was entirely consistent with the Guidelines.

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[1] *See e.g.* Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment*, **Nat'l L. J.**, July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 **S. Cal. L. Rev.** 357 (1992) (U.S. District Judge, Eastern District of New York).

The Guidelines are clear that a sentencing judge may depart downward from the Guidelines in "atypical" or "unusual" cases. U.S.S.G. Ch.1, Pt.A, § 4(b) and § 5K2.0. Moreover, we have noted that, except for a small set of *prohibited* factors, " 'the Commission does not intend to limit the kinds of factors, whether or not mentioned elsewhere in the guidelines, that could constitute grounds for departure in an unusual case.' " *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991) (quoting U.S.S.G. Ch.1, Pt. A, § 4(b)). This approach affords the district court a certain degree of flexibility and permits it to act in a more humane and reasonable manner than the Guidelines would otherwise allow.

In its consideration of the three-point combination departure, the panel rejects the relatively enlightened view of departures expressed in both the Guidelines and our prior cases. Judge Davies' based his three-point departure on a combination of three non-prohibited factors. He considered the fact that the officers would be subject to additional punishment, both professionally and in prison. *Koon*, 833 F. Supp. at 785-86. He then noted that because "neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal conduct," there was an absence of any need to protect the public. *Id.* at 786. Finally, he concluded that "a specter of unfairness" marked the federal trial because it followed an earlier unsuccessful state prosecution of the officers. *Id.* at 790. Judge Davies emphasized that he did not base his departure on any one of the discrete factors individually. Instead, he departed only because of the combined presence of three circumstances which "taken together, justify a reduced sentence." *United States v. Koon*, 833 F. Supp. 769, 786.

In considering the three-point departure, the panel, despite including cursory language in its opinion acknowledging the correct rule, applies a method of review that if adopted generally would essentially eliminate departures based on a combination of factors. What the panel did was to examine each

factor individually and conclude that each was not "appropriate" to support a departure. The panel failed to make the proper inquiry: whether the factor was *prohibited* by the Guidelines. Instead, it created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure. The fallacy in the panel's approach is that if the individual factors must each be "appropriate", there would be no need to rely on a combination of factors.

The panel's methodology is at odds with our established precedent. The principle underlying our combination departure cases is rooted in the common sense maxim that the whole is greater than the sum of its parts. For that reason, in reviewing combination cases, we have considered the totality of the circumstances and the interplay between or among the various factors, not whether the individual factors in the mix could in themselves constitute a ground for departure. "[I]t will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decisions." *Cook*, 938 F.2d. at 153; *see also United States v. Fairless*, 975 F.2d 664, 669 (9th Cir. 1992); *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992), *and subsequently superseded*, U.S.S.G. § 5H1.12; *United States v. Takai*, 941 F.2d 738, 743 (9th Cir. 1991).

The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead, it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor — notwithstanding the fact that *none* of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review.

A clear example of the panel's erroneous approach is found in its discussion of the vulnerability to prison abuse issue. The

panel rejected Judge Davies' consideration of this factor on the ground that "the number of defendants who might qualify for *this departure* is virtually unlimited . . . ." Slip op. at 9431 (emphasis added). The term "this departure" is clearly incorrect. There was *no departure* based on the factor that the panel is discussing. The departure at issue was based on a combination of factors that included as only one element the potential for prison abuse. The number of persons who would be affected by the combination of factors would *not* be "virtually unlimited." To the contrary, the number would be small indeed. Thus, the panel's statement as to the number "who might qualify" is just plain wrong. It reaches its mistaken conclusion only because it violated *Cook*'s clear command and considered one factor in the combination "abstractly and alone." *Cook*, 938 F.2d at 153. Far more important, however, it is this method of analysis that permeates the panel's opinion and leads it, inevitably, to the wrong result.

The panel's discussion of the *kinds* of factors that Judge Davies considered in his three-point departure gives rise to even more serious problems. Some of our cases have held that only factors that relate to the offender's culpability or to the nature of the offense may justify departure. *See, e.g., United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Others have reached precisely the opposite conclusion. *See, e.g., United States v. Crippen*, 961 F.2d 882, 885 (9th Cir. 1992). The panel fails to reconcile these irreconcilable positions.

Although the panel's opinion purports to endorse the highly restrictive view set forth in *Alvarez-Cardenas*, in the end it only adds to the chaos in our case law. Following *Alvarez-Cardenas*, the opinion flatly states that "personal and professional consequences" of a conviction "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." Slip. op. at 9427. However, that statement, while consistent with *Alvarez-*

Cardenas, conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991) (stating that the effect of imprisonment on the offender's family *is* a permissible basis for departure); *see also* § 5H1.6. Perhaps because it recognized the conflict in our cases, or perhaps because it perceived the gross unfairness of its position, the panel substantially undermines the statement by announcing that it does "not intend to imply that factors that do not speak to" the nature of an offense or culpability "are *never* relevant." Slip op. at 9427 n.3 (emphasis in original). Such conflicting pronouncements within the same opinion cannot help district judges who must administer the Guidelines and make sense of our holdings; nor should they stand as the law of this circuit.

Moreover, the panel's statements that the "personal and professional consequences" of a conviction may not be considered constitutes a square rejection of the holding we announced in *United States v. Aguilar*, 994 F.2d 609, 643-45 (9th Cir. 1993) (opinion of O'Scannlain, J.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). In *Aguilar*, Judge O'Scannlain, in the part of his opinion joined by Judge Hug, explained that district courts have discretion to depart downward from the Guidelines on the basis of the "additional punishment" beyond imprisonment that a conviction may impose. *Id.* at 643.

The panel does not address *Aguilar*'s reasoning. While the panel is correct that the original panel opinion in *Aguilar* no longer represents binding precedent, it is surely wrong in concluding that the opinion therefore merits no more than a dismissive half-sentence reference to that fact. Slip op. at 9425. The en banc court reheard the case and reversed Aguilar's conviction; accordingly, it did not reach the sentencing question. As a result, the court as a whole never expressed any doubt as to the correctness of Judge O'Scannlain's extensive and perceptive discussion of downward departures. Unlike the panel here, Judge O'Scannlain saw no reason to prohibit sentencing judges from taking into account the practical effects

of sentences on the lives of affected individuals. As his opinion made clear, the Guidelines were not intended to treat human beings as impersonal objects whose fate was to be determined solely on the basis of statistical surveys.

Judge O'Scannlain's opinion in *Aguilar* was still binding at the time Judge Davies imposed the sentences on Koon and Powell. Accordingly, he acted properly in basing the sentencing decision on that holding. *Koon*, 833 F. Supp. at 789.[2] At the time of sentencing, our law was clear that "additional punishment" did constitute a proper basis for a downward departure. At a minimum, Judge Davies, as well as other district judges, are entitled to an explanation from the panel as to why we are so abruptly rejecting the *Aguilar* reasoning. So, too, are the defendants who were properly sentenced under the law as it existed at the time of sentencing only to find that on appeal a panel of our court adopted a different view that requires them to be resentenced under a harsher standard.[3] In my opinion, the panel was not justified in peremptorily dismissing a reasoned analysis that bears so directly on the issues in this case and has such drastic consequences for these and other defendants.

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[2] *Aguilar* was not taken en banc until almost a month after Judge Davies filed his opinion.

[3] The fact that Koon and Powell will now be resentenced under a stricter interpretation of the Guidelines than existed at the time of their initial sentencing may itself constitute a circumstance to be considered at resentencing. While the change in our case law may not be enough in itself to justify a downward departure, the sentencing judge may want to consider the psychological and emotional effect on the defendants of the change in our law. Both defendants were initially properly sentenced to shorter terms under a rule of law that was valid at the time. There is a certain expectancy that results from such a circumstance. Each defendant now faces a potentially harsher prison term only because the sentencing rules have been changed as the result of the government's appeal. Ironically, the panel's decision may thus have the effect of creating a new "specter of unfairness" which could be considered, consistent with the Guidelines, as one of the factors in a combination justifying departure.

II.

The panel's analysis of the five-point departure, like its analysis of the three-point departure, is premised on a highly restrictive and inflexible reading of the Guidelines and a view hostile to the district court's proper role in sentencing. Judge Davies based his five-point downward departure on his finding that there was victim misconduct. *Koon*, 833 F. Supp. at 787. The panel accepted this finding; accordingly, our analysis must start from that premise, correct or not. The Guidelines specifically provide for downward departures when victim misconduct "contribute[s] significantly to provoking the offense behavior." § 5K2.10. The panel reversed Judge Davies' departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response. Slip op. at 9437. Here, again, the panel erred.

The applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct. The policy statement specifically instructs a district court to consider "*any other relevant conduct* by the victim that substantially contributed to the danger presented." § 5K2.10(e) (emphasis added). Moreover, it suggests that a departure may be warranted if the unlawful behavior follows an "*extended course* of provocation and harassment." *Id.* (emphasis added).

Having erroneously concluded that provocation encompasses only a very limited range of acts, the opinion surmises that in fact Judge Davies must have based the departure on the volatility of the arrest. The panel then proceeds to explain why volatility *never* constitutes a permissible ground for departure in an excessive force case — although it can point to no guideline language that would support such an absolutist view. Slip op. at 9438-39. In short, the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart.

III.

Our cases adopt two contradictory general approaches to downward departures. One approach emphasizes the importance of the district court's discretion to depart and stresses that the guidelines "were not meant to be a straightjacket for district judges." *Cook*, 938 F.2d at 152; *United States v. Garza-Juarez*, 992 F.2d 896, 911 (9th Cir. 1993). The other takes a narrow view of the sentencing judge's role and severely limits the circumstances that justify departure. *See, e.g., Alvarez-Cardenas*, 902 F.2d at 737. For reasons that still confound me, in this case the panel casts its lot with the restrictive approach.

In choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner. Certainly, the panel does nothing to resolve the underlying conflict in our case law. Only an en banc panel can do that in any event. As of today, our rules remain unclear and district judges are left with little guidance. They will simply have to do their best to determine which of our cases — and which of the contradictory statements in the panel's opinion — are to be followed in particular circumstances.

As a result of our refusal to take this case en banc, all Judge Davies will know with certainty on remand is that in order to depart from the Guidelines, he must point to "a legitimate sentencing concern," slip op. at 9427 & 9434, and must consider factors that are consistent with the "structure and purposes of the Guidelines," slip op. at 9424. The conflicting definitions we have given to these virtually empty phrases will leave Judge Davies without specific guidance when he decides whether to depart downwardly once again. If after reexamining all of the facts and circumstances in this most regrettable case, he again concludes that there are factors present that warrant a downward departure from the Guide-

lines, he will only be able to do his duty as he himself sees it. I hope that this time any exercise of the discretion he is supposed to possess will be examined with greater understanding and solicitude.

IV.

As a final point, I note that once again, consistent with our longstanding policy, we refuse to disclose to the public important information regarding an official action of this court. Following an en banc vote, we only tell the public whether or not the en banc call carried. We refuse to disclose whether a decision not to go en banc was made by an equally divided court or whether only a single judge wished to reconsider the panel's decision. We also refuse to disclose how individual judges cast their ballots.[4] By these rules, we immunize our individual actions from public scrutiny. In my opinion, we are wrong to do so. The public has a right to know how all public officials, including judges, conduct the public's business.

I am aware of the arguments in favor of the rule that we have adopted. It is possible that a vote for or against en banc review will be misconstrued by the public as constituting agreement with or opposition to the merits of the opinion in question even though a judge has cast his ballot on entirely different grounds. However, the fact that a public action may

[4]Under our rules, all active judges are permitted to vote on en banc calls and a call fails unless a majority of the non-recused judges cast affirmative votes. Our rules do not permit judges who wish to record their votes to do so. Instead, judges may inform the public of their votes only through their participation in dissents from denials of suggestions for rehearing en banc. Many judges prefer not to join in published opinions expressing disagreement with procedural actions of this court, even when those actions determine the outcome of important cases. As I have noted before, our rule ensures that the public knows even less about our en banc process than it does about the Supreme Court's decisions with respect to granting certiorari. *See Harris v. Vasquez*, 949 at 1539 (explaining that Supreme Court Justices are always permitted to make public their votes on petitions for certiorari).

be misunderstood is not a reason for suppressing information. Whatever the costs of disclosure may be, I have no doubt that the costs of secrecy are greater.

I have addressed the problems of non-disclosure of en banc votes before. Previously, I noted that the public is often deprived of crucial information regarding death penalty cases. *See Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990). I have also noted that our rule of secrecy is equally indefensible in other cases that involve questions of great public interest. *See Elder v. Holloway*, 984 F.2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting) (disagreeing with the rule precluding disclosure of en banc votes in the context of a civil right case).

Indeed, it is usually the most controversial cases — and the ones that are likely to have the widest impact on the public — that are the subject of the most fiercely debated en banc calls. The votes cast in them are clearly of concern to the public. The people have a right to know both how close the decision is on our en banc votes and how each judge voted on particular calls.

Information about the numerical outcome of the votes is necessary in order for the public, the legal community, and the academic world to assess the en banc process itself. For example, it would surely be of interest to those who study the courts if a series of en banc calls failed even though supported by a majority of the judges who actually voted. With such information, court observers could evaluate the soundness of our voting procedures and suggest reforms. There is another reason that readily comes to mind. There are several vacancies on this court. In fact, one seat has been vacant for well over two years. Disclosure of the numerical outcome of our en banc votes would assist the public in determining the practical impact on our operations of the president's inexplicable failure to perform his constitutional duties expeditiously and

to better assess the quality of his performance in office. Could one or two votes have made the difference here? The public is entitled to the information that would answer that question.

The public also has a right to know how individual judges voted. Circuit judges have on occasion been appointed to the Supreme Court — even Ninth Circuit judges. The votes on en banc calls constitute a part of a circuit judge's performance of his judicial duties. The votes may provide an indication of how certain judges would perform on the highest court, particularly with respect to the granting of writs of certiorari. In any event, the public has a right to know how each judge who has life tenure has performed all aspects of his judicial functions. Public scrutiny and accountability are the only checks there are on us, other than impeachment.

Finally, the disclosure of the votes of individual judges might reveal whether there are discernible patterns to the outcome of our en banc calls. It could shed light on whether our votes are consistently based on ideological lines and whether there is a pattern in our voting that is related to the party affiliation of the presidents who appointed us. That information would clearly be of interest to students of the judicial system, and, given that so many of our en banc calls involve controversial cases, probably the public and members of the political branches of government as well.

To me, the reasons for disclosure are obvious and irrefutable. I particularly regret that in this case, which is of such public concern, the rules prevent the disclosure of information to which the public is so clearly entitled.

O'SCANNLAIN, Circuit Judge, specially concurring in the dissent, with whom T.G. NELSON and KLEINFELD, Circuit Judges, join:

With the exception of Part IV, I am delighted to concur in Judge Reinhardt's dissent. While desirability of disclosure of

en banc voting results is a worthy topic for discussion, I am not convinced this is the appropriate forum.

APPENDIX 3

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. STACEY C. KOON, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50561 93-50608 D.C. No. CR-92-00686-JGD-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. LAURENCE M. POWELL, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50562 93-50609 D.C. No. CR-92-00686-JGD-2 ORDER AND AMENDED DISSENT AND CONCURRENCE

Filed January 12, 1995
Amended February 2, 1995

Before: James R. Browning and Betty B. Fletcher, Circuit Judges, and James M. Fitzgerald,* District Judge.

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

ORDER

The dissent from the order denying rehearing en banc filed January 12, 1995 is amended as follows.

Immediately after Slip op. 367, line 4, insert the following:

Of course, the Supreme Court may yet provide Judge Davies with the guidance that our own court has refused to offer. I note in this regard that the panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion authored by then-Chief Judge Breyer, a leading member of the initial Sentencing Commission. *See United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993).

Rivera holds that the Guidelines do permit departures for personal or professional consequences of conviction that are unusual. *Id.* at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will "*not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original). In all three respects, Judge Breyer's approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case.

Given the frequency with which district judges are faced with the type of question that now confronts Judge Davies, and given the conflict within the circuits created by the panel's opinion, perhaps the Supreme Court will deem it

important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines.

REINHARDT, Circuit Judge, dissenting, with whom PREGERSON, WIGGINS, KOZINSKI, NOONAN, and HAWKINS, Circuit Judges, join, and with whom O'SCANNLAIN, T.G. NELSON, and KLEINFELD, Circuit Judges, join, except as to Part IV:

I dissent from the refusal to rehear this case en banc. While I agree that there is no prejudicial error that requires reversal of the convictions, I believe that the panel seriously erred in vacating the downward departures ordered by Judge Davies. In my opinion, the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

In stretching to reach its result, the panel casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines. It is only by exhalting the rigid calculations of charts and tables over the judgment of human beings that the panel reaches its conclusion that Judge Davies was too lenient. The panel's encroachment on district court discretion epitomizes the mechanical and inflexible approach to sentencing that so many critics contend the Guidelines themselves represent.[1] Indeed, under the panel's view of the district judge's role in sentencing, district courts would be

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[1] *See e.g.* Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment*, Nat'l L. J., July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357 (1992) (U.S. District Judge, Eastern District of New York).

divested of much of the limited discretion they retain under the Guidelines. As a result, the panel's opinion would make far worse an already unfair and unjust sentencing scheme. It is difficult to believe that the panel truly wishes such an approach to apply to defendants generally.

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permits it to act in a more humane and reasonable manner than the Guidelines would otherwise allow.

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The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead, it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor — notwithstanding the fact that *none* of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review.

A clear example of the panel's erroneous approach is found in its discussion of the vulnerability to prison abuse issue. The panel rejected Judge Davies' consideration of this factor on the ground that "the number of defendants who might qualify for *this departure* is virtually unlimited . . . ." Slip op. at 9431 (emphasis added). The term "this departure" is clearly incorrect. There was *no departure* based on the factor that the panel is discussing. The departure at issue was based on a combination of factors that included as only one element the potential for prison abuse. The number of persons who would be affected by the combination of factors would *not* be

"virtually unlimited." To the contrary, the number would be small indeed. Thus, the panel's statement as to the number "who might qualify" is just plain wrong. It reaches its mistaken conclusion only because it violated *Cook*'s clear command and considered one factor in the combination "abstractly and alone." *Cook*, 938 F.2d at 153. Far more important, however, it is this method of analysis that permeates the panel's opinion and leads it, inevitably, to the wrong result.

The panel's discussion of the *kinds* of factors that Judge Davies considered in his three-point departure gives rise to even more serious problems. Some of our cases have held that only factors that relate to the offender's culpability or to the nature of the offense may justify departure. *See, e.g., United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Others have reached precisely the opposite conclusion. *See, e.g., United States v. Crippen*, 961 F.2d 882, 885 (9th Cir. 1992). The panel fails to reconcile these irreconcilable positions.

Although the panel's opinion purports to endorse the highly restrictive view set forth in *Alvarez-Cardenas*, in the end it only adds to the chaos in our case law. Following *Alvarez-Cardenas*, the opinion flatly states that "personal and professional consequences" of a conviction "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." Slip. op. at 9427. However, that statement, while consistent with *Alvarez-Cardenas*, conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991) (stating that the effect of imprisonment on the offender's family *is* a permissible basis for departure); *see also* § 5H1.6. Perhaps because it recognized the conflict in our cases, or perhaps because it perceived the gross unfairness of its position, the panel substantially undermines the statement by announcing that it does "not intend to imply that factors that do not speak to" the nature of an offense or culpability "are *never* relevant." Slip

op. at 9427 n.3 (emphasis in original). Such conflicting pronouncements within the same opinion cannot help district judges who must administer the Guidelines and make sense of our holdings; nor should they stand as the law of this circuit.

Moreover, the panel's statements that the "personal and professional consequences" of a conviction may not be considered constitutes a square rejection of the holding we announced in *United States v. Aguilar*, 994 F.2d 609, 643-45 (9th Cir. 1993) (opinion of O'Scannlain, J.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). In *Aguilar*, Judge O'Scannlain, in the part of his opinion joined by Judge Hug, explained that district courts have discretion to depart downward from the Guidelines on the basis of the "additional punishment" beyond imprisonment that a conviction may impose. *Id.* at 643.

The panel does not address *Aguilar*'s reasoning. While the panel is correct that the original panel opinion in *Aguilar* no longer represents binding precedent, it is surely wrong in concluding that the opinion therefore merits no more than a dismissive half-sentence reference to that fact. Slip op. at 9425. The en banc court reheard the case and reversed Aguilar's conviction; accordingly, it did not reach the sentencing question. As a result, the court as a whole never expressed any doubt as to the correctness of Judge O'Scannlain's extensive and perceptive discussion of downward departures. Unlike the panel here, Judge O'Scannlain saw no reason to prohibit sentencing judges from taking into account the practical effects of sentences on the lives of affected individuals. As his opinion made clear, the Guidelines were not intended to treat human beings as impersonal objects whose fate was to be determined solely on the basis of statistical surveys.

Judge O'Scannlain's opinion in *Aguilar* was still binding at the time Judge Davies imposed the sentences on Koon and Powell. Accordingly, he acted properly in basing the sentenc-

ing decision on that holding. *Koon*, 833 F. Supp. at 789.[2] At the time of sentencing, our law was clear that "additional punishment" did constitute a proper basis for a downward departure. At a minimum, Judge Davies, as well as other district judges, are entitled to an explanation from the panel as to why we are so abruptly rejecting the *Aguilar* reasoning. So, too, are the defendants who were properly sentenced under the law as it existed at the time of sentencing only to find that on appeal a panel of our court adopted a different view that requires them to be resentenced under a harsher standard.[3] In my opinion, the panel was not justified in peremptorily dismissing a reasoned analysis that bears so directly on the issues in this case and has such drastic consequences for these and other defendants.

II.

The panel's analysis of the five-point departure, like its analysis of the three-point departure, is premised on a highly restrictive and inflexible reading of the Guidelines and a view hostile to the district court's proper role in sentencing. Judge Davies based his five-point downward departure on his finding that there was victim misconduct. *Koon*, 833 F. Supp. at

[2]*Aguilar* was not taken en banc until almost a month after Judge Davies filed his opinion.

[3]The fact that Koon and Powell will now be resentenced under a stricter interpretation of the Guidelines than existed at the time of their initial sentencing may itself constitute a circumstance to be considered at resentencing. While the change in our case law may not be enough in itself to justify a downward departure, the sentencing judge may want to consider the psychological and emotional effect on the defendants of the change in our law. Both defendants were initially properly sentenced to shorter terms under a rule of law that was valid at the time. There is a certain expectancy that results from such a circumstance. Each defendant now faces a potentially harsher prison term only because the sentencing rules have been changed as the result of the government's appeal. Ironically, the panel's decision may thus have the effect of creating a new "specter of unfairness" which could be considered, consistent with the Guidelines, as one of the factors in a combination justifying departure.

787. The panel accepted this finding; accordingly, our analysis must start from that premise, correct or not. The Guidelines specifically provide for downward departures when victim misconduct "contribute[s] significantly to provoking the offense behavior." § 5K2.10. The panel reversed Judge Davies' departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response. Slip op. at 9437. Here, again, the panel erred.

The applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct. The policy statement specifically instructs a district court to consider "*any other relevant conduct* by the victim that substantially contributed to the danger presented." § 5K2.10(e) (emphasis added). Moreover, it suggests that a departure may be warranted if the unlawful behavior follows an "*extended course* of provocation and harassment." *Id.* (emphasis added).

Having erroneously concluded that provocation encompasses only a very limited range of acts, the opinion surmises that in fact Judge Davies must have based the departure on the volatility of the arrest. The panel then proceeds to explain why volatility *never* constitutes a permissible ground for departure in an excessive force case — although it can point to no guideline language that would support such an absolutist view. Slip op. at 9438-39. In short, the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart.

III.

Our cases adopt two contradictory general approaches to downward departures. One approach emphasizes the importance of the district court's discretion to depart and stresses that the guidelines "were not meant to be a straightjacket for district judges." *Cook*, 938 F.2d at 152; *United States v.*

Garza-Juarez, 992 F.2d 896, 911 (9th Cir. 1993). The other takes a narrow view of the sentencing judge's role and severely limits the circumstances that justify departure. *See, e.g., Alvarez-Cardenas*, 902 F.2d at 737. For reasons that still confound me, in this case the panel casts its lot with the restrictive approach.

In choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner. Certainly, the panel does nothing to resolve the underlying conflict in our case law. Only an en banc panel can do that in any event. As of today, our rules remain unclear and district judges are left with little guidance. They will simply have to do their best to determine which of our cases — and which of the contradictory statements in the panel's opinion — are to be followed in particular circumstances.

As a result of our refusal to take this case en banc, all Judge Davies will know with certainty on remand is that in order to depart from the Guidelines, he must point to "a legitimate sentencing concern," slip op. at 9427 & 9434, and must consider factors that are consistent with the "structure and purposes of the Guidelines," slip op. at 9424. The conflicting definitions we have given to these virtually empty phrases will leave Judge Davies without specific guidance when he decides whether to depart downwardly once again. If after reexamining all of the facts and circumstances in this most regrettable case, he again concludes that there are factors present that warrant a downward departure from the Guidelines, he will only be able to do his duty as he himself sees it. I hope that this time any exercise of the discretion he is supposed to possess will be examined with greater understanding and solicitude.

Of course, the Supreme Court may yet provide Judge Davies with the [illegible]nce that our own court has refused to

offer. I note in this regard that the panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion authored by then-Chief Judge Breyer, a leading member of the initial Sentencing Commission. *See United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993).

Rivera holds that the Guidelines do permit departures for personal or professional consequences of conviction that are unusual. *Id.* at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will "*not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original). In all three respects, Judge Breyer's approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case.

Given the frequency with which district judges are faced with the type of question that now confronts Judge Davies, and given the conflict within the circuits created by the panel's opinion, perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines.

IV.

As a final point, I note that once again, consistent with our longstanding policy, we refuse to disclose to the public important information regarding an official action of this court. Following an en banc vote, we only tell the public whether or not

the en banc call carried. We refuse to disclose whether a decision not to go en banc was made by an equally divided court or whether only a single judge wished to reconsider the panel's decision. We also refuse to disclose how individual judges cast their ballots.[4] By these rules, we immunize our individual actions from public scrutiny. In my opinion, we are wrong to do so. The public has a right to know how all public officials, including judges, conduct the public's business.

I am aware of the arguments in favor of the rule that we have adopted. It is possible that a vote for or against en banc review will be misconstrued by the public as constituting agreement with or opposition to the merits of the opinion in question even though a judge has cast his ballot on entirely different grounds. However, the fact that a public action may be misunderstood is not a reason for suppressing information. Whatever the costs of disclosure may be, I have no doubt that the costs of secrecy are greater.

I have addressed the problems of non-disclosure of en banc votes before. Previously, I noted that the public is often deprived of crucial information regarding death penalty cases. *See Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990). I have also noted that our rule of secrecy is equally indefensible in other

[4]Under our rules, all active judges are permitted to vote on en banc calls and a call fails unless a majority of the non-recused judges cast affirmative votes. Our rules do not permit judges who wish to record their votes to do so. Instead, judges may inform the public of their votes only through their participation in dissents from denials of suggestions for rehearing en banc. Many judges prefer not to join in published opinions expressing disagreement with procedural actions of this court, even when those actions determine the outcome of important cases. As I have noted before, our rule ensures that the public knows even less about our en banc process than it does about the Supreme Court's decisions with respect to granting certiorari. *See Harris v. Vasquez*, 949 at 1539 (explaining that Supreme Court Justices are always permitted to make public their votes on petitions for certiorari).

cases that involve questions of great public interest. *See Elder v. Holloway*, 984 F.2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting) (disagreeing with the rule precluding disclosure of en banc votes in the context of a civil right case).

Indeed, it is usually the most controversial cases — and the ones that are likely to have the widest impact on the public — that are the subject of the most fiercely debated en banc calls. The votes cast in them are clearly of concern to the public. The people have a right to know both how close the decision is on our en banc votes and how each judge voted on particular calls.

Information about the numerical outcome of the votes is necessary in order for the public, the legal community, and the academic world to assess the en banc process itself. For example, it would surely be of interest to those who study the courts if a series of en banc calls failed even though supported by a majority of the judges who actually voted. With such information, court observers could evaluate the soundness of our voting procedures and suggest reforms. There is another reason that readily comes to mind. There are several vacancies on this court. In fact, one seat has been vacant for well over two years. Disclosure of the numerical outcome of our en banc votes would assist the public in determining the practical impact on our operations of the president's inexplicable failure to perform his constitutional duties expeditiously and to better assess the quality of his performance in office. Could one or two votes have made the difference here? The public is entitled to the information that would answer that question.

The public also has a right to know how individual judges voted. Circuit judges have on occasion been appointed to the Supreme Court — even Ninth Circuit judges. The votes on en banc calls constitute a part of a circuit judge's performance of his judicial duties. The votes may provide an indication of how certain judges would perform on the highest court, particularly with respect to the granting of writs of certiorari. In

any event, the public has a right to know how each judge who has life tenure has performed all aspects of his judicial functions. Public scrutiny and accountability are the only checks there are on us, other than impeachment.

Finally, the disclosure of the votes of individual judges might reveal whether there are discernible patterns to the outcome of our en banc calls. It could shed light on whether our votes are consistently based on ideological lines and whether there is a pattern in our voting that is related to the party affiliation of the presidents who appointed us. That information would clearly be of interest to students of the judicial system, and, given that so many of our en banc calls involve controversial cases, probably the public and members of the political branches of government as well.

To me, the reasons for disclosure are obvious and irrefutable. I particularly regret that in this case, which is of such public concern, the rules prevent the disclosure of information to which the public is so clearly entitled.

O'SCANNLAIN, Circuit Judge, specially concurring in the dissent, with whom T. G. NELSON and KLEINFELD, Circuit Judges, join:

With the exception of Part IV, I am delighted to concur in Judge Reinhardt's dissent. While desirability of disclosure of en banc voting results is a worthy topic for discussion, I am not convinced this is the appropriate forum.